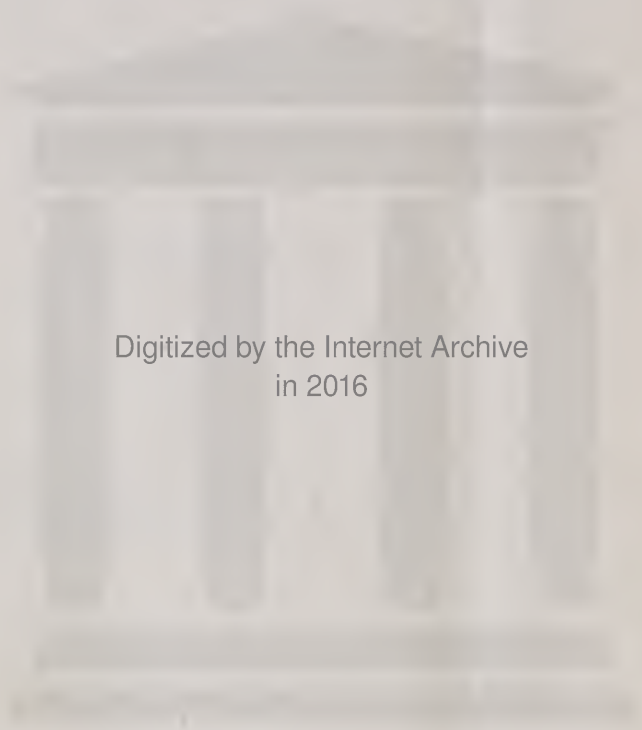

# SELECTED DECISIONS

OF THE

# NATIVE APPEAL COURT

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## CENTRAL DIVISION
## 1951

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VOLUME I
(Final)

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NOTE.—The decisions of the Central Division are published only once a year and not in parts.

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# MAINTENANCE: ILLEGITIMATE CHILDREN.

CASE No. 1 OF 1951 (GERMISTON).

**JANET MTAUNG *v.* AARON MBONANI.**

JOHANNESBURG: 23rd February, 1951. Before H. F. Marsberg, Esq., President, and Messrs. H. W. Warner and D. J. S. Visser, Members of the Court (Central Division).

*Inquiry and order for maintenance—Deserted Wives and Children's Ordinance, No. 44 of 1903 (Transvaal)—Section ten bis of Act No. 38 of 1927, extends jurisdiction to Native Commissioners where Natives are involved—Statute applicable to all persons irrespective of colour—Although child is illegitimate Native Law cannot be applied.*

*Claim:* Maintenance of child under Deserted Wives and Children's Ordinance, No. 44 of 1903 (Transvaal).

*Plea:* Defendant admits that he is the father of illegitimate child.

*Judgment:* Because child is illegitimate Court rules that it has no jurisdiction to hear enquiry. Application is dismissed.

*Appeal:* On Law viz. whether section *ten bis* of Act No. 38 of 1927 confers jurisdiction on Native Commissioners only where legitimate children are concerned.

*Held:* Inquiry falls under the provisions of a statute applicable to all persons irrespective of colour and section *ten bis* of Act No. 38 of 1927 merely makes provision for Native Commissioners to exercise jurisdiction where Natives are involved.

The powers of the Native Commissioner are those as prescribed by the relevant Statute or Ordinance.

*Authorities:*

(1) Deserted Wives and Children's Ordinance, No. 44 of 1903 (Transvaal).
(2) Section *ten bis* of Act No. 38 of 1927.
(3) Ruth Manzi *v.* Johnston Mngomezulu, 1943, N.A.C. (T. & N.).

Marsberg (President), delivering judgment of the Court:—

In the Native Commissioner's Court for Boksburg one, Aaron Mbonani, was summoned to appear to show cause why he should not be ordered to maintain or contribute to the maintenance of his illegimate child aged about 4 months, under the provisions of the Deserted Wives and Children's Ordinance, No. 44 of 1903, of the Transvaal. When the matter came before the Native Commissioner by virtue of the provisions of section *ten bis* of Act No. 38 of 1927, he decided to apply Native Law and ruled that in view of the fact that the child was illegitimate his Court had no jurisdiction to hear the inquiry and/or make an order for maintenance. Against that ruling an appeal has been lodged by the complainant, mother of the child.

The reasons for judgment indicate that the Native Commissioner was materially influenced by proceedings in another case between the two Natives concerned. The record of that case was not before the Native Commissioner in the inquiry under review and he should not have taken cognisance of what transpired therein.

This inquiry falls under the provisions of a statute applicable to all persons irrespective of colour. One law only applies to all. Its nature will be ascertainable by reference to sections *one* and *two* of the Ordinance. Section *ten bis* of Act No. 38 of 1927 merely



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makes provision for Native Commissioners to exercise jurisdiction, under the laws pertaining to Deserted Wives and Children, where Natives are involved. The section does not prescribe a different law for Natives. The Native Commissioner has been misled by the case of Ruth Manzi *v.* Johnston Mngomezulu [1943, N.A.C. (T. & N.), Case No. 57 of 1943], which applies only to Natal where there are other statutory provisions which bear upon questions of this nature.

In this inquiry the Native Commissioner was required to determine whether in the circumstances of the case the father of the child should be ordered to contribute towards its maintenance and if so, to what extent. He could in determining the latter question, take into account all the relative factors, including those relevant and ascertainable from any other proceedings, proved before him in the proper way. But it must be pointed out that this inquiry was not such a "suit or proceeding", as is referred to in section *eleven* (1) of Act No. 38 of 1927, in which he could exercise a discretion as to whether Native Law should be applied. This inquiry is circumscribed by the provisions of the Ordinance. There is a Chapter in Gardiner and Lansdowne Criminal Law dealing with the Statutes concerning Deserted Wives and Children.

We agree that the Native Commissioner erred in ruling that he had no jurisdiction in this inquiry. His ruling is set aside and the record is returned for further attention.

An application for condonation of the late prosecution of the appeal was allowed by us.

For Appellant: Adv. Leon, R.N., instructed by Mr. L. Baker, P.O. Box 69, Benoni.

For Respondent: In person.

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# ESTATE ENQUIRY: CAPACITY OF NATIVE COMMISSIONER.

CASE No. 2 OF 1951 (KRUGERSDORP).

**BERTHA RABORETHI *v.* NATIVE COMMISSIONER, KRUGERSDORP, N.O.**

JOHANNESBURG: 16th February, 1951. Before H. F. Marsberg, Esq., President, and Messrs. H. W. Warner and F. P. van Gass, Members of the Court (Central Division).

*Claim for* £200 *against Native Commissioner as the representative of the estate—Duties of a Native Commissioner are supervisory—Claims against estate must be brought against the heir or person appointed as representative—Position of Native Commissioner analogous to that of Master of the Supreme Court.*

*Claim:* £200 from the Native Commissioner, Krugersdorp, as the Representative of the Estate of the late John Sabisa, who was indebted to the plaintiff in this amount at the time of his death and which claim the Native Commissioner rejected.

*Plea:* (1) Defendant excepts to summons on the ground that the summons does not disclose a cause of action in that the defendant is not a representative of the estate.

*Judgment:* Summons dismissed.

*Appeal:* On questions of law.

*Held:* The law relating to Native estates does not disclose any circumstances in which a Native Commissioner can be the representative of the estate of a deceased Native. It thus follows that the summons does not disclose a cause of action.

The appeal is dismissed with costs.

*Authorities:*

(1) Government Notice No. 1664 of 1929.
(2) Section *twenty-three* (6) of Act No. 38 of 1927.
(3) Act No. 24 of 1913.
(4) Xaba *v.* Dube, 1933, N.A.C. (T. & N.), 10.
(5) Radebe *v.* Mabangake, 1940, N.A.C. (T. & N.), 38.
(6) Mtetwa *v.* Zekalole, 1933, N.A.C. (T. & N.), 35.
(7) Whitfield on *South Arfican Native Law,* page 321.
(8) Rogers, Vol. 2, page 248.
(9) *Ex Parte* Minister of Native Affairs, in *re* Yako *v.* Beyi, S.A.L.R., 1948 (1).
(10) Whamatimise Togani *v.* Kazamula Koza, 1942, N.A.C. (T. & N.), 65.
(11) Lottie Radebe *v.* Joseph Gambu, 1947, N.A.C. (T. & N.), 88.
(12) Elizabeth Mashinini *v.* Samson Mashinini, 1947, N.A.C. (T. & N.).
(13) Mhleni Dhlamini and Others *v.* Sokwetshaba Ngubane, 1948, N.A.C. (N.E.D.), 15.

Warner (Member), delivering judgment of the Court:—

Plaintiff sued the Native Commissioner, Krugersdorp, in his capacity as the Representative of the Estate of the late John Sabisa, a Native, who died at Krugersdorp on the 4th July, 1949, for the sum of £200, alleging that the late John Sabisa was indebted to plaintiff in the sum of £200 and that plaintiff had notified the Native Commissioner of her claim against the estate but the said claim was rejected.

The Native Commissioner upheld an exception that the summons does not disclose a cause of action against the defendant in that the defendant is not the representative of the estate of the late John Sabisa, as alleged, and the defendant says that the regulations promulgated under Government Notice No. 1664, dated the 20th September, 1929, do not permit of the defendant being a representative of the estate of the late John Sabisa.

Plaintiff has appealed against this judgment.

Mr. Steyn, in his able argument, has submitted that there are circumstances in which a Native Commissioner can be the representative of the estate of a deceased Native and, this being the case, it is not necessary to set out these circumstances in the summons so that the exception, which amounts to a plea in bar, should not have been upheld but defendant should have been required to plead to the summons.

Mr. Welsh's reply to this argument is that, in no circumstances, can a Native Commissioner be the representative of the estate of a deceased Native.

We are thus required to examine the position in order to ascertain whether there are any circumstances in which a Native Commissioner can be the representative of the estate of a deceased Native.

Under Native Law, which follows the law of primogeniture, the ordinary rule is that the heir steps into the place of the deceased and assumes his rights and obligations. If the legislature intended to alter this position, it would have stated so clearly and concisely. So far from doing so, it has provided in section *twenty-three* (6) of Act No. 38 of 1927 that, if a party, who is not a Native, has a claim against the estate of a deceased Native, the heir, if no executor has been appointed by the Master of the Supreme Court, is deemed to be the executor in the estate as if he had been duly appointed as such.

Section 3 (1) of Government Notice No. 1664 of 1929, which was promulgated under section *twenty-three* (10) of Act No. 38 of 1927, provides that all the property in certain Native estates shall be administered under the supervision of the Native Commissioner of the district in which the deceased ordinarily resided and the Native Commissioner shall give such directions in regard to the distribution thereof as shall seem to him fit and shall take all steps necessary to ensure that the provisions of the Act and of these regulations are complied with.

Mr. Steyn submits that, in terms of this regulation, which requires a Native Commissioner to give directions in regard to the distribution of a Native estate and to take all steps necessary to ensure that the provisions of the law are complied with, a Native Commissioner must be regarded as the representative of all estates mentioned in the regulation.

We are unable to accept this interpretation of the law. In our view, the duties of a Native Commissioner under this regulation are supervisory and analogous to those of the Master of the Supreme Court under the provisions of Act No. 24 of 1913. Mr. Welsh drew attention to the extraordinary position that would arise if the Native Commissioner were the representative of Native estates as the Native Commissioner could be sued in respect of claims against the estate.

Section 4 (1) of Government Notice No. 1664 of 1929, provides that, for the administration and distribution of any property in the estate of a deceased Native who has not left a valid will, the appointment of an executor shall not be necessary but a Native Commissioner may appoint a suitable person to represent the estate if he considers that it is desirable to do so and that he shall make such an appointment where it becomes necessary to pass transfer of immovable property, not being land in a location held under quitrent conditions, registered in the name of the deceased.

It has been argued that the intention of this regulation is that a Native Commissioner should be the representative of the estates of all Natives who ordinarily resided in his District and died without leaving a valid will and that he has been given the power to delegate his authority by appointing a suitable person to represent the estate if he should consider it desirable to do so.

We are unable to accept this view. In our opinion, it is clear that the object of the legislature was to dispense, as far as possible, with formalities in the administration of Native estates and that it was intended that the Native Custom, under which the heir steps into the place of the deceased, should continue but that the Native Commissioner should have discretion to appoint a suitable person to represent the estate, if, for any reason, such as the absence of the heir, he considers it desirable to do so.

Section 6 of the regulations provides that, if the deceased Native had been in the employ of any person, the Native Commissioner of the district in which he was employed, may collect and realise any asset in and may enforce any claim belonging to the estate; such Native Commissioner may from any moneys collected or realised by him pay any preferent claims requiring immediate liquidation and he is required to render an account of assets collected and moneys expended to the Native Commissioner in whose District the deceased was domiciled.

It has been argued that as "to enforce a claim" the Native Commissioner would have to bring an action in a competent Court it follows that he could be sued for payment of a preferent claim.

We do not agree with this contention. The Native Commissioner of the District, in which the deceased Native was employed, acts in a temporary capacity. He collects assets, pays preferent

claims requiring immediate liquidation, and accounts for the balance to the Native Commissioner in whose District deceased was domiciled. If the latter considers it desirable to do so, he may then appoint a suitable person to represent the estate. Anyone who has a claim against the estate can bring an action against the heir or the person appointed as representative of the estate but we do not consider that he would have a right of action against the Native Commissioner.

Section 9 of the regulations provides that, in certain circumstances, if a Native has died leaving a valid will, the Master of the Supreme Court may appoint and require the Native Commissioner of the District in which the deceased ordinarily resided, to act in his official capacity as executor dative in the estate.

This provision does not affect the present case because the defendant has not been sued as executor dative but as representative of the estate.

We come to the conclusion, therefore, that an examination of the law relating to Native estates does not disclose any circumstances in which a Native Commissioner can be the representative of the estate of a deceased Native. It thus follows that the summons does not disclose a cause of action.

The appeal is dismissed with costs.

For Appellant: Adv. Steyn, J.R., instructed by Messrs. Helman & Michel.

For Respondent: Adv. Welsh, R.S., instructed by Government Attorney, His Majesty's Building, Johannesburg.

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CASE No. 3 OF 1951 (ALEXANDRA).

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**NANCY DIBAKOANE** *v.* **SOLOMON DIBAKOANE.**

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JOHANNESBURG: 14th February, 1951. Before H. F. Marsberg, Esq., President, Messrs. H. W. Warner and F. P. van Gass, Members of the Court (Central Division).

*Estate inquiry—Presumption of death can only follow on an Order of Court—Native Commissioner should have made no declaration of there being an heir.*

*Claim:* Presumably estate enquiry with a view to appointing an heir.

*Plea:* Nil.

*Judgment:* That Albert Dibakoane is presumed to be dead and that Solomon Dibakoane is declared the heir.

*Appeal:* Against the whole finding of the Native Commissioner.

*Held:* Court feels that finding of Native Commissioner was wrong and in order to correct proceedings it is ordered that his finding be struck out.

The appeal is allowed and the finding of the Native Commissioner, declaring Solomon Dibakoane to be the heir to Albert Dibakoane is set aside.

*Authorities:* Nil.

Warner (Member), delivering judgment:—

It appears that a Native named Albert Dibakoane left home on 21st October, 1950, in his motor car for the purpose of conducting business as a taxi-driver. He did not return and a few days later the motor car was found abandoned in circumstances which indicated that he may have been murdered.

On the 4th November, 1950, the Native Commissioner held an enquiry at which Albert's two brothers and a woman named Nancy, who claims to be Albert's wife by Native Custom, were present.

From the record of the proceedings in this matter it is difficult to ascertain exactly in what capacity the Native Commissioner purported to act. The record is in the form of a memorandum. No statements of the parties or witnesses have been recorded. But the Native Commissioner gave a finding that Solomon Dibakoane was declared to be the heir of the late Albert Dibakoane and in his reasons for judgment he refers to section *twenty-three* (4) of Act No. 38 of 1927. From this we must assume that he held an estate inquiry in terms of the Regulations framed under the Act. Now, in our opinion, he was quite unjustified in arriving at the finding which he recorded at the conclusion of the inquiry, viz. that Solomon Dibakoane was declared to be the heir to his brother's estate. Presumption of death could only follow on an Order of Court. The facts in this case were not such that a Court would be forced to the conclusion that there is no reasonable hope of the person being alive.

The Native Commissioner should have held that there was no proof of death of Albert and he should have made no declaration of there being an heir. We feel that his finding was wrong and in order to correct the proceedings we order that his finding be struck out.

The appeal is allowed and the finding of the Native Commissioner, declaring Solomon Dibakoane to be the heir to Albert Dibakoane is set aside. There will be no order as to costs.

For Appellant: Mr. Willen of Mr. H. M. Basner.

For Respondent: Mr. J. Chain, P.O. Box 9729, Johannesburg.

## DAMAGES FOR BREACH OF PROMISE: SEDUCTION: MAINTENANCE.

CASE No. 4 OF 1951 (KRUGERSDORP).

**SHEILA VILAPI** *v.* **NOAH MOLEBATSI.**

JOHANNESBURG: 15th February, 1951. Before H. F. Marsberg, Esq., President, and Messrs. H. W. Warner and F. P. van Gass, Members of the Court (Central Division).

*Damages for breach of promise, seduction and maintenance for support of child—£50 already paid to plaintiff's father regarded as equivalent to "engagement cattle" which are paid under Native Custom; when marriage takes place it becomes lobola—if not and the man is at fault it is forfeited to father—if girl is at fault it is returned to suitor—Fines merge in dowry—£50 regarded as covering damages for seduction and pregnancy and loss of dignity caused by defendant's failure to marry plaintiff.*

*Claim:*

(*a*) £100 damages for breach of promise.
(*b*) £100 damages for seduction.
(*c*) £4 per month maintenance for support of child.
(*d*) Alternative relief.
(*e*) Costs of suit.

*Plea:* Denial.

*Judgment:* For plaintiff for claims (*a*) and (*b*) and awards £20 and £40 respectively. Dismisses claims (*c*) and (*e*). Defendant to pay costs.

*Appeal:*

(1) That the judgment is against the evidence and weight of evidence.
(2) That the Native Commissioner ignored the fact that the action was initiated under Native Law—that a settlement was arrived at and that defendant carried out his obligations under the settlement.
(3) Having regard to the previous settlement the damages awarded to the plaintiff in the action are excessive.

*Held:* Seduction did not take place under promise of marriage and there have been no loss of earnings. Beyond the fact that the seduction was followed by pregnancy, there are no grounds for special damages. Plaintiff's father has received what would amount to substantial lobola. Damages awarded to woman excessive and reduced to £5.

The appeal is allowed with costs and the judgment of the Native Commissioner is altered to read:—

"For plaintiff for £5 and costs."

*Authorities:* Booi *v.* Xozwa, 4, N.A.C., 310.

Warner (Member), delivering judgment:—

Plaintiff sued defendant for (*a*) £100 damages for breach of promise; (*b*) £100 damages for seduction; (*c*) maintenance for the support of the child born to the plaintiff at the rate of £4 per month; (*d*) alternative relief and (*e*) costs of suit.

In the course of the hearing, defendant admitted that he was the father of the child born to plaintiff. He pleaded, however, that plaintiff and her father had, through Mr. Ntwase, an attorney practising in Johannesburg, demanded payment from him of £200 as damages for seduction and pregnancy of, and breach of promise to marry plaintiff; that it had been agreed that he should pay an amount of £50 in instalments of £2. 10s. per month; that he had paid a sum of £42. 10s. and was willing to pay the balance of £7. 10s. in accordance with the agreement. He submitted that the agreement of settlement was binding on the plaintiff and asked that the summons be dismissed with costs.

After hearing evidence the Native Commissioner gave judgment for plaintiff for £20 as damages for breach of promise and £40 as damages for seduction. He dismissed the claim for maintenance and ordered defendant to pay costs of suit.

Defendant has appealed against this judgment on the following grounds:—

1. That the Judicial Officer's judgment is against the evidence and the weight of the evidence.
2. That the Judicial Officer erred in ignoring the fact that the action was in the first place initiated under Native Law and a settlement arrived at and carried out by the defendant under such laws and thus misdirected himself to the prejudice of the defendant.
3. That having regard to the previous settlement and the benefit received by the plaintiff's guardian under previous proceedings, the damages awarded to the plaintiff in the action was excessive.

In her summons plaintiff alleged that in consequence of an undertaking by defendant to marry her she permitted him to seduce an cohabit with her. In her evidence, however, she states that she was in her eighth month of pregnancy when defendant promise to marry her and that this was the only occasion on which she agreed to marry him. Defendant denies that he agreed to marry plaintiff at any time.

Plaintiff's father states that, when he discovered that plaintiff was pregnant she made a report to him and he sent a messenger to defendant who, subsequently came to plaintiff's father and admitted the seduction and stated that he intended to pay "lobola" and marry plaintiff. His evidence is supported by that of Edward Qakamba and Simon Golobile who state that they were present at the interview with defendant and his brothers. Simon Golobile states, however, that plaintiff's father was not present at the interview and that all the talking on defendant's side was done by his brother while he (defendant) remained silent. On the other hand, the witnesses agree that it was arranged that defendant should pay £50 as "lobola" and that £5 was paid on account.

Defendant, at first, denied that he and his brother had held a meeting with plaintiff's people but afterwards admitted that they had done so. He states that he agreed to pay £50 as damages for seduction and pregnancy and that £5 was paid in respect of the agreement. He also commenced his evidence by denying that he had caused plaintiff's pregnancy but afterwards admitted that he was the father of the child born to her.

On the 21st May, 1949, Mr. Attorney Ntwasa wrote the following letter to defendant:—

"Mr. Noah Molebatsi,
Molotestad Public School,
Molotestad,
Boons,
Rustenburg.

Dear Sir,

I have been instructed by my client Sheila Velaphi, assisted by her father and guardian Gilbert Velaphi, to demand from you, as I hereby do, the immediate payment of the sum of £200 (two hundred pounds) as and for damages for seduction and pregnancy and breach of promise to marry her.

Sheila is now delivered of a child of whom you are the father. Of the £200 (two hundred pounds) claimed, you have only paid £5 (five pounds).

Unless payment is received in my office at once on behalf of my client, my instructions are to issue summons against you on the 1st June, 1949, without further notice or delay.

Sheila will also claim maintenance for the child in such amount per month as the Court will order. You can save further trouble by coming to see me to arrange how to settle this matter out of Court and save Departmental enquiries.

Yours faithfully,

(Signed) J. J. Ntwasa."

On the 30th May, 1949, defendant signed the following document:—

"I, the undersigned, Noah Molebatsi, do hereby promise to pay, through the Office of Attorney T. J. J. Ntwasa, Johannesburg, on behalf of Gilbert Velsphi, being Lobola due by me to the aforesaid Gilbert Velpahi in respect of Sheila Velaphi, the sum of £45 (forty-five) pounds as £5 Lobola is already paid thus making a total of £50 (fifty pounds), first payment to be made in June 1949 in the

amount of £5, and then £2. 10s. per month, each and every month thereafter until the whole amount of £50 is fully paid.

Dated at Johannesburg this 30th day of May, 1949."

(Signed) N. E. Molebatsi.

Witness: George Molebatsi his brother.

Plaintiff's father states that he instructed Mr. Attorney Ntwasa to claim £50 as compensation for his expenses in educating his daughter who would be unable to complete her education on account of her pregnancy, and that Mr. Ntwasa made a mistake in claiming damages for seduction and pregnancy. He is, however, bound by the acts of his agent and he has also stated that it was agreed that defendant should pay £50 as "lobola".

Plaintiff's father could claim damages against defendant only under Native Custom. We consider that the £50 should be regarded as the equivalent of "engagement cattle" which are paid under Native Custom. This would mean that the £50 is paid to the girl's father and, if the marriage takes place, it becomes "lobola" and if the marriage does not take place, it is returned to the suitor if the girl is at fault and forfeited to the girl's father if the man is at fault. In the present case, defendant was at fault because he contracted a civil marriage with someone else so the £50 becomes forfeited to plaintiff's father. As fines merge in dowry, the £50 must be regarded as covering damages for seduction and pregnancy as well as for loss of dignity caused by defendant's failure to marry plaintiff.

Plaintiff is entitled to bring an action against defendant under the Common Law although her father has received a fine under Native Custom but the amount received by her father must be taken into consideration when awarding damages to her. (See case of Booi *v.* Xozwa, 4, N.A.C., 310.)

The next question to be decided is the amount which should be awarded to plaintiff as damages. Seduction did not take place under promise of marriage and there have been no loss of earnings. Beyond the fact that the seduction was followed by pregnancy, there are no grounds for awarding special damages. Plaintiff's father has received what would amount to a substantial "lobola" when it is remembered that in Native cases in the Transvaal, cattle are regarded as having a value of £3 per head.

In the circumstances we consider that damages in the sum of £5 are sufficient.

The appeal is allowed with costs and the judgment of the Native Commissioner is altered to read:—

"For Plaintiff for £5 and costs."

For Appellant: Mr. G. H. Behrman, of Messrs. Behrman & Behrman, Johannesburg.

For Respondent: Mr. H. Helman, of Messrs. Helman & Michel, P.O. Box 3592, Johannesburg.

# LANDLORD AND TENANT: EJECTMENT.

CASE NO. 5 OF 1951 (JOHANNESBURG).

**JACOB MOKGOKO *v.* BETTY MORAKE.**

JOHANNESBURG: 22nd February, 1951. Before H. F. Marsberg, Esq., President, and Messrs. H. W. Warner and D. J. S. Visser, Members of the Court (Central Division).

*Order of ejectment of sub-tenant—Native Location Regulations adopted by Johannesburg Town Council set out in Administrator's Notice No. 94 of 1925—No permit shall be transferred and no site or dwelling shall be sub-let, except with written permission of the Superintendent—Validity of plaintiff's tenancy not a pre-requisite.*

*Claim:* An order of ejectment, on the ground that plaintiff is the tenant of certain premises and that defendant is in wrongful and unlawful possession of them.

*Plea:* Denial and stated that he was a sub-tenant of them.

*Judgment:* For plaintiff as prayed with costs.

*Appeal:*

1. That the Native Commissioner erred in law in holding:—
   (*a*) That section 8 of Chapter I of the Native Location Regulations of Johannesburg were complied with by the Superintendent of the Orlando Native Location.
   (*b*) That section 12 of the aforesaid regulations were complied with by the Superintendent.
   (*c*) That the plaintiff was a lawful tenant.
   (*d*) That there was a *prima facie* case calling for rebuttal.
2. On fact.

*Held:* That plaintiff is the lawful occupier of house No. 460, Orlando Location, that she gave defendant permission to reside there for a short period in 1944 and that the latter remained in the house and occupied it without authority and that she is entitled to an order of ejectment against the defendant.

The appeal is disimssed with costs.

*Authorities:*

(1) Native Location Regulations as set out in Administrator's Notice No. 94 of 1925.
(2) Truck and Car Company (Pty.), Ltd., *v.* Matola (1939), T.P.D.), p. 436.

Warner (Member), delivering judgment of the Court:—

Plaintiff sued defendant for an order of ejectment in respect of the premises on Stand No. 460, Orlando, on the ground that plaintiff is the tenant of the said premises and that defendant is in wrongful and unlawful possession of them.

In his plea defendant denied that he was in wrongful and unlawful possession of the premises and stated that he was a sub-tenant of them.

After evidence had been led for plaintiff, defendant's attorney closed his case without leading evidence and the Native Commissioner granted judgment for plaintiff as prayed with costs.

Defendant has appealed against this judgment on the following grounds:—

1. The Native Commissioner erred in law in the following respects:—
   (*a*) In holding that section 8 of Chapter 1 of the Native Location Regulations of Johannesburg, as amended from time to time, were complied with by the Superintendent of the Orlando Native Location in holding that a receipt for rent is a proper, valid, and legal residential or site permit or any other legal permit permitting the plaintiff (now the respondent) to occupy the premises situate on Stand No. 460, Orlando Location.
   (*b*) In holding that section 12 of the aforesaid regulations were complied with by the Superintendent notwithstanding the Superintendent's evidence that he only kept a record of occupiers, and that same was therefore not a register.

(*c*) In holding that the plaintiff was a lawful tenant or a tenant notwithstanding the regulations aforesaid or the evidence of the Superintendent referred to above.

(*d*) In holding there was a *prima facie* case calling for rebuttal as both the Superintendent of the Orlando Location and plaintiff (now appellant) committed clear offences of the aforesaid regulations and that plaintiff (now respondent) had no *locus standi* to sue for ejectment.

2. (*a*) That the Native Commissioner erred in fact in holding that the plaintiff was a "registered holder" of the premises.

(*b*) That the Native Commissioner erred in fact in holding that the proper notice was given or that the defendant was a trespasser as against the plaintiff (now respondent).

The Native Location Regulations adopted by the Johannesburg Town Council were set out in Administrator's Notice No. 94 of the 3rd March, 1925. Section 5 (*a*) of these Regulations provides that every person desirous of residing in a location or occupying a dwelling in a Native village shall apply to the Superintendent for a permit to do so and, if the superintendent is satisfied that the applicant is a fit and proper person to reside in the location or Native village, he shall grant him a permit accordingly.

Section 13 provides for the payment of rents and various charges and stipulates that all such sums shall be payable monthly in advance to the Superintendent on or before the seventh day of each month.

Section 8 provides that no site permit or residential permit shall be transferred, and no site or dwelling shall be sub-let, except with the written permission of the Superintendent and to a person approved of by him.

There is no regulation prescribing the form in which residential permits should be issued.

Mr. McFadyen, Superintendent of Orlando Location, states that it is the practice to issue receipts for rent only and that these receipts are regarded as residential permits.

Plaintiff has produced receipts issued in her name in respect of the premises on Stand No. 460, Orlando, and the Superintendent states that she is the tenant of these premises.

We are not prepared to hold that her tenancy of the premises is invalid merely because the receipts do not bear the word "permit".

Section 12 of the Regulations provides that the Superintendent shall keep (in a form to be prescribed by the Council), a register of all persons to whom site permits, residential permits or lodger's permits are issued.

The Superintendent states that in his record of occupiers, plaintiff is shown as the occupier of house No. 460. He does not state what form this record takes but, in any case, we fail to appreciate how a failure by the Superintendent to keep the register as required by the regulations could invalidate plaintiff's tenancy.

In the case of Truck and Car Company (Pty.), Ltd., *v.* Matola, 1939, T.P.D., 436, where a stand-holder had sold to, and put the purchaser in possession of, his rights to, and occupation of, a stand, in the absence of transfer and registration in the registers of the municipality, the Court held that registration in the municipal location register was not necessary to give transfer of the rights of the seller, that the requirement of the Superintendent's permission to transfer was one for the benefit and convenience of the location authorities and that delivery of the site permit was not necessary to effect transfer of the seller's rights. On this analogy, it was not a pre-requisite to establish the validity of plaintiff's

tenancy of the property in question that the requirements of law in regard to the Superintendent's duties should have been carried out.

The evidence for Plaintiff is uncontradicted and establishes that plaintiff is the lawful occupier of house No. 460, Orlando Location, that she gave defendant permission to reside there for a short period in 1944 and that the latter remained in the house and occupied it without authority.

Before us, defendant's counsel has admitted that defendant is in unlawful occupation of the property in question. He states that defendant's whole case is based on the submission that plaintiff's tenancy is unlawful and that she has no *locus standi* to bring an action against defendant. For the reasons given, we hold that plaintiff's tenancy of the property is lawful and that she is entitled to an order of ejectment against defendant.

The appeal is dismissed with costs.

For Appellant: Adv. J. A. C. van Loggerenberg, instructed by Mr. L. L. Ronthal, Chancellor Hou e. Johannesburg.

For Respondent: Mr. I. Taylor, Pritchard Street, Johannesburg.

## DEFAMATION: DAMAGES.

CASE No. 6 OF 1951 (ZEERUST).

**MOSALA MOUMAKWA** *v.* **FRANS MATOTOSI NAGENG.**

JOHANNESBURG: 27th February, 1951. Before H. F. Marsberg, Esq., President, and Messrs. H. W. Warner and B. J. D. Liebenberg, Members of the Court.

*Damages for defamation for certain statement made in answer to a question put when giving evidence as a witness in a judicial proceeding—Privilege not absolute—Essentials which must be proved in order to make a witness liable in damages for a defamatory statement made under oath—Plaintiff not given opportunity to discharge onus which rested on him—The interpretation given in the summons of words alleged to have been spoken in Tswana must be accepted as correct unless disputed by the plaintiff or proved in evidence to be an untrue one—Summons dismissed without allowing plaintiff to adduce evidence to discharge the onus.*

*Claim:* £50 as damages for certain defamatory statement made in the Tswana language.

*Plea:* That he had been wrongly cited and a denial that he defamed plaintiff.

*Judgment:* Summons dismissed with costs.

*Appeal:* On fact and that the judgment is wrong in law.

*Held:* Plaintiff should have been afforded an opportunity to lead his evidence.

The judgment of the Native Commissioner is set aside and the case is returned for further attention.

*Authorities:*

(1) Magumya *v.* Muzofile, 1938, N.A.C. (T. & N.), 4.
(2) Gold Seller *v.* Kuranda, 1906, T.H., p. 188.
(3) Van Rensburg *v.* Snyman, 1927 (O.P.D.), p. 123.
(4) Norden *v.* Oppenheimer, 1846, 3 M., p. 42.
(5) MacGregor *v.* Sayles, 1909 (T.S.), p. 553.
(6) Dold *v.* Van Wyk, 1917 (E.D.L.), p. 375.
(7) Rubel *v.* Katzenellenbogen, 1915 (C.P.D. 627).

Warner (Member), delivering judgment of the Court:—

Plaintiff sued defendant for £50 as damages for defamation and furnished the following particulars:—

1. That both parties hereto are Natives.
2. That plaintiff is a member of and the Treasurer of the Kgotla of Chief Lekoloane Sebogodi, Braklaagte No. 168, Marico District, and that Chief Lekoloane Sebogodi is the successor to the late Chief George Moiloa.
3. That about a month before the 17th May, 1950, a Native woman Bertha Moiloa, daughter of the late Chief George Moiloa, maliciously defamed the character of the said plaintiff by uttering to him and of him, in the presence of a number of witnesses, the following defamatory words concerning him, and in the Tswana language:—

   "O tla swa ja ka rre ka o re setla; o sa re tlhokomele; ka o le moloi o bolaile rre."

   which translated into the English language mean:—

   "You will die like my father because you are ill-treating us, you take no heed of us because you are a witchdoctor—you have killed my father."
4. That on the 17th May, 1950, the plaintiff brought an action against Bertha Moiloa before Chief Lekoloane Sebogodi at the Kgotla for uttering the above-mentioned defamatory words concerning him; and that there in reply to the Chief who had asked him whether what Bertha had alleged was true, the said defendant maliciously uttered the following untrue and defamatory words concerning him, in the Tswana language, and in the presence of the assembled Kgotle:—

   "E ke Boamaruri se se Builweng ke Bertha Moumakwa a ntheile are ke e na ya Leileng Kgosi George."

   which translated into the English language mean:—

   "Yes, it is true what has been said by Bertha; Plaintiff told me that he had bewitched the Chief George."

   That the Chief, as a result of these words being uttered by the said defendant, did not allow the action to proceed.
5. That it is submitted that the defamatory words contained in paragraph 3 hereof were confirmed by the said defendant in uttering the defamatory words contained in paragraph 4 hereof and that thereby he made the defamatory words uttered by Bertha Moiloa, mentioned in paragraph 3 hereof, his own.
6. That it is submitted that the defamatory words contained in paragraphs 3 and 4 hereof, taken together, and that even the words mentioned in paragraph 4 as being defamatory, taken alone, are defamatory *per se* or *prima facie* but the innuendo of the defamatory words contained in paragraphs 3 and 4, taken together, and the defamatory words contained in paragraph 4, taken alone, is that plaintiff is a witchdoctor and a murderer who by malicious and magical means and by sorcery procured the death of the late Chief George Moiloa, the father of Bertha Moiloa, and as such is a dangerous person who should be avoided socially and generally by all the members of his tribe and who should be held in hatred by them.
7. That plaintiff denies that he told defendant that he had bewitched the late Chief George Moiloa and also denies that he bewitched or killed him or that he procured his death by bewitching him.
8. That as a result of the defamatory words uttered by the defendant in the Kgotla, plaintiff has suffered serious damage in that the people of his tribe now avoid contact with him as far as possible and look upon him with

unfriendly and distrusting and hostile eyes; that he is now an object of hatred to certain members of his tribe; and that he fears that he may now become the subject of a malicious physical attack by those that fear and hate him because the attacking and killing of alleged witch-doctors who are alleged to have bewitched and procured the death of others is by no means unknown among Native tribes.

9. That Chief Lekoloane Sebogodi is impatient of delay in the bringing of this action as plaintiff has a bad name in the tribe.

In his plea defendant stated that he had been wrongly cited and that plaintiff had no claim against him for defamation and that he denied having defamed the plaintiff.

After argument, and without hearing, any evidence, the Native Commissioner dismissed the summons with costs.

Plaintiff has appealed on the following grounds:—

(1) That the Assistant Native Commissioner erred in allowing the defendant's attorney, after he had excepted to the summons on the grounds that it disclosed no cause of action, because as alleged by him the words used were not defamatory, to argue on the question of privilege when defendant's written plea discloses no plea of privilege which according to law must be *specially* pleaded.

(2) That the Assistant Native Commissioner erred in allowing the exception and dismissing the summons, on the grounds according to his verbal judgment:—

(*a*) That the alleged defamatory words were not defamatory.

(*b*) That the defendant had established privilege, without calling evidence, which it was pointed out was available, on the point or question whether the defendant uttered the words complained is, *animus injuriandi*.

(3) That the judgment is wrong in law.

The summons discloses that the statement complained of was made by defendant in answer to a question put to him when giving evidence as a witness in judicial proceedings so that there is a presumption that it was made on a privileged occasion. It must be remembered, however, that this is not an absolute privilege but a qualified one. The Native Commissioner appears to be under the impression that the privilege was absolute because he states in his reasons for judgment that defendant's application for dismissal of the summons goes to the root of the matter and is an answer to the summons.

The law in regard to the privilege of witnesses was set out fully in the case of Magunya *v.* Muzofile, 1938, N.A.C. (T. & N.), 4, where it was stated that a witness who gives evidence during legal proceedings is privileged in respect of what is said by him in the witness-box as the occasion of his giving evidence not only confers on him a qualified privilege but the onus is strongly on a plaintiff to prove that a witness was actuated by malice in making a statement alleged to be defamatory.

The Native Commissioner appears to have misinterpreted the following passage occurring in the judgment in that case: "It is only when a witness takes advantage of his position to make irrelevant observations not called for by the questions addressed to him that he exposes himself to an action for defamation—Gold Seller *v.* Kuranda, 1906, T.H. at p. 188."

The Native Commissioner seems to have read this passage to mean that as long as the statement is made by a witness when replying to a question addressed to him, his privilege is absolute but this is not the case.

Reference to the two cases quoted shows that, in each case, evidence was led and it was only after plaintiff had failed to prove that defendant had been actuated by malice that the summons was dismissed.

The passage quoted from Magunya's case means that a witness who makes irrelevant observations not called for by the questions addressed to him does not enjoy the privilege granted to a witness, but it cannot be read to mean that a witness who makes a statement in reply to a question put to him enjoys an unqualified privilege.

It is also stated in Magunya's case that where a witness is sued for a defamatory statement made by him under oath, the qualified privilege furnished by the occasion can be displaced and the witness made liable in damages only on proof of these things—

(1) that the witness was actuated by express malice;
(2) that the words spoken were false;
(3) that the witness who uttered them has no reasonable ground for believing them to be true.

In the present case, plaintiff was not given an opportunity to prove the things required, but the summons was dismissed without any evidence being adduced or plaintiff's attorney intimating that he did not wish to call evidence.

Respondent's counsel in this Court has admitted that plaintiff was entitled to an opportunity to discharge the onus which rested on him but he has submitted that a proper translation of the words alleged to have been spoken in Tswana would disclose that the statement was not defamatory.

The plea does not contain a denial that the translation given in the summons is a true one. The matter appears to have been raised in Court but no evidence was adduced to show what the correct translation is.

Until it is admitted by plaintiff, or it is proved by evidence, that the interpretation of the words alleged to have been used, as set out in the summons, is an untrue one, it must be accepted as correct.

A heavy onus rests on the plaintiff to prove that defendant was actuated by express malice but, however difficult it may be for him to do so, there is no reason why he should not be afforded an opportunity of establishing such proof and the Native Commissioner erred in dismissing the summons without allowing plaintiff to adduce evidence to discharge the onus.

The appeal is allowed with costs, the judgment of the Native Commissioner is set aside and the case is returned for further attention.

For Appellant: Mr. A. Barlow, P.O. Box 16, Zeerust.

For Respondent: Adv. J. Brodie, instructed by Mr. S. J. van der Spuy, P.O. Box 53, Zeerust.

# ESTATE INQUIRY: HEIRS: DEVOLUTION OF PROPERTY.

CASE No. 7 OF 1951 (KROONSTAD).

**DANIEL THEXISO *v.* PHILLIP MOGOROSI.**

KROONSTAD: 23rd April, 1951. Before H. F. Marsberg, Esq., President, and Messrs. H. W. Warner and F. P. van Gass, Members of the Court (Central Division).

*Inquiry—Administration of Estates—not held in accordance with Government Notice No.* 1664 *of* 1929*—Declaration of heir—Devolution of property—Particular attention should be given to the nature of each marriage contracted by deceased.*

*Appeal:* Against that portion of the finding declaring that Elias Thekiso as eldest son of Sarah Thekiso is the heir of the Left Hand House and as such, is awarded the house on Stand No. 103B, Kroonstad Location.

*Held:* Court in exercising powers of review, directs that the whole finding be set aside and the enquiry be returned for further attention so that the manner of devolution of the property be decided in accordance with the provisions of Government Notice No. 1664 of 1929.

*Authorities:*

(1) Whitfield's South African Native Law, page 252.
(2) Government Notice No. 1664 of 1929.

Warner (Permanent Member), delivering the judgment of the Court:—

This is an appeal against a finding of the Native Commissioner, Kroonstad, in an estate inquiry held in terms of Government Notice No. 1664 of 1929.

It appears that deceased Oriel Thekiso married a woman who died in 1928. During her lifetime he acquired a house on Stand No. 104B, Kroonstad Location. Subsequently Oriel Thekiso married another woman and acquired a house on Stand No. 103B, Kroonstad Location, where he lived with his second wife and family while his family by his first wife occupied the house on Stand No. 104B. Oriel died in 1942 and the two families continued to occupy the separate houses but in 1950 Daniel Thekiso, eldest son of deceased by his first wife, and Sarah Thekiso, second wife of deceased, each claimed to be entitled to the whole property in the estate, namely, the two houses.

Members of the two families appeared before the Native Commissioner who made notes of statements made by them and then recorded the following finding: "That estate be divided into two, i.e. a Right Hand House and a Left Hand House and that Daniel Thekiso declared heir to Right Hand House, i.e. house on Stand No. 104B, Location, and entitled to receive transfer thereof. That Elias Thekiso is heir to Left Hand House, i.e. house on Stand No. 103B, Location, that Phillip Thekiso be guardian and representative of such heir to receive on behalf of such heir and in his name transfer property to such heir". Elias Thekiso is the eldest son of deceased by his second wife.

An appeal has been noted against that portion of the finding declaring that Elias Thekiso as eldest son of Sarah Thekiso is the heir of the Left Hand House and, as such, awarding him the house on Stand No. 103B, Kroonstad Location.

The information before us is very meagre. A proper enquiry was not held as the Native Commissioner did not take evidence on oath but merely made notes of information furnished to him by the parties.

Before we can decide how the estate should be administered, it is essential that we should know in what manner deceased was married. In a letter to the Native Commissioner, the Manager, Native Administration Department, Municipality of Kroonstad, states that Sarah Thekiso was legally married to deceased. We presume that he means that she was married to him by civil rites but we have no information as to whether the marriage was in community of property or by antenuptial contract or whether community of property was excluded by section *twenty-two* (6) of Act No. 38 of 1927, or how the first marriage was contracted.

The successive marriages of wives by Christian or civil rites do not create a "house" as recognised by Native Custom (see page 252 of Whitfield's South African Native Law and the cases quoted therein).

The appeal is against a portion of the finding but in exercising our powers of review we direct that the whole finding be set aside and the enquiry returned for further attention so that the Native Commissioner can decide on the manner of the devolution of the property in accordance with the provisions of Government Notice No. 1664 of 1929. Particular attention should be directed to the nature of each marriage contracted by deceased, i.e. whether Native customary union or a marriage by civil or Christian rites.

As stated before, this was not a proper inquiry and appellant does not appear to have taken steps to place the full information required before the Native Commissioner. For these reasons, we do not consider that there should be any order in regard to the costs of appeal.

The judgment of this Court will be as follows:—

"The appeal is allowed and the finding of the Native Commissioner is set aside. The record is returned for further attention, There will be no order in regard to costs of appeal."

For Appellant: Mr. G. P. Botha, P.O. Box 51, Kroonstad.

For Respondent: No representation.

# LOBOLA, RETURN OF: NATIVE CUSTOMARY UNION AND CIVIL MARRIAGE.

CASE No. 8 OF 1951 (MARQUARD).

**BOUMAN SEKONYELLA** *v.* **AGNES LEAHA.**

KROONSTAD: 24th April, 1951. Before H. F. Marsberg, Esq., President, and Messrs. H. W. Warner and F. P. van Gass, Members of the Court (Central Division).

*Claim for return of lobola of Native customary union during subsistence of civil marriage—Order for return of lobola illegal as no action for lobola can be instituted until marriage by civil rites has been dissolved.*

*Claim:* Return of twelve head of cattle or their value £60 on the ground that defendant's daughter left him and refused to return to him. In his particulars of claim plaintiff states that in 1945 he married defendant's daughter in the Magistrate's Office, Marquard.

*Plea:* To the effect that defendant's daughter did not return to her so that she was not liable for the return of the lobola.

*Judgment:* As claimed for plaintiff.

*Appeal:* On four grounds. Ground (3) states:—

It is admitted in the evidence that the defendant's daughter and the plaintiff were married according to civil rites and consequently the judgment of the Native Commissioner ordering the return of the lobola is erroneous and illegal as no action for lobola can be instituted until the marriage by civil rites has been dissolved.

*Held:* No claim for the restoration of the dowry can be entertained during the subsistence of the marriage. Marriages by civil rites can only be dissolved during the lifetime of the parties by action in the Native Divorce Court or the Supreme Court.

The appeal is allowed with costs and the judgment of the Native Commissioner is altered to read: Dagvaarding verwerp met koste.

*Authorities:* Kanise *v.* Ngodwane, 5, N.A.C., 49.

Warner (Permanent Member), delivering the judgment of the Court:—

Plaintiff sued defendant in the Court of the Native Commissioner, Marquard, for twelve head of cattle or their value £60.

In his particulars of claim he stated that, in 1945, he married defendant's daughter Adelina in the Magistrate's Office, Marquard, which marriage still subsists; that he paid defendant, as lobola, ten head of cattle and one horse, being the equivalent of twelve head of cattle and that Adelina had left him and refused to return to him. He submitted that the marriage contract was broken and that he was entitled to a return of the cattle paid to defendant.

Defendant's plea was to the effect that Adelina had not returned to her so that she was not liable for the return of the lobola.

After hearing evidence, in the course of which plaintiff again said that he was married at the Magistrate's Office, the Native Commissioner gave the following judgment:—

"Vonnis vir eiser vir die betaling deur verweerder van (*a*) die 10 beeste en een perd, of as verweerder die vee nie meer besit nie, dan (*b*) betaling van 10 ander beeste en 1 perd, of (*c*) betaling van 12 beeste, of (*d*) betaling van £60 hulle waarde, met koste."

Defendant has noted an appeal on four grounds but it will be sufficient for us to consider only the third ground, namely, that it is admitted in the evidence that the defendant's daughter and the plaintiff were married according to civil rites and consequently the judgment of the Native Commissioner ordering the return of the lobola is erroneous and illegal as no action for lobola can be instituted until the marriage by civil rites has been dissolved.

The following remarks, taken from the judgment in the case of Kanise *v.* Ngodwane, 5, N.A.C., 40, are applicable to the present case:—

"The return of dowry, either voluntarily or by Order of Court, dissolves a marriage contracted according to Native Law and Custom, but can have no such effect upon a civil marriage. An action for the return of a wife married according to Native Custom results either in the return of the wife or the dissolution of the marriage by the restoration of the dowry, a position incapable of reconciliation with a civil marriage. An order for the return of the dowry without a dissolution of the marriage would place the husband in possession both of his dowry and his wife, a condition entirely opposed to Native Custom and one which could easily lead to collusion and fraud. It has been laid down repeatedly by this Court that dowry paid in connection with a marriage whether contracted according to civil rites or Native Custom must be dealt with under Native Law. This Court has also held that where a marriage has been contracted by civil rites no claim for the restoration of the dowry can be entertained during the subsistence of the marriage."

Marriages by civil rites can be dissolved during the lifetime of the parties only by action in the Native Divorce Court or the Supreme Court.

The appeal is allowed with costs and the judgment of the Native Commissioner is altered to read: "Dagvaarding verwerp met koste".

The judicial officer has signed the judgment as Magistrate. Judicial Officers who hold dual appointments as Magistrate and Native Commissioner should be careful to record their correct title in signing the judgment.

For Appellant: Mr. H. Gersohn, Attorney, Cross Street, Kroonstad.

For Respondent: No representation.

# CONDONATION OF LATE NOTING OF APPEAL: JUDGMENT CONFIRMED: CIVIL IMPRISONMENT ORDER.

CASE No. 9 OF 1951 (JOHANNESBURG).

**EDWARD KUMALO** *v.* **JOHN NGWENYA.**

JOHANNESBURG: 5th June, 1951. Before H. F. Marsberg, Esq., President, and Messrs. D. S. Cooke and R. L. Eaton, Members of the Court (Central Division).

*Application for condonation of late noting of appeal refused—Circumstances in which indulgence of Court cannot be sought—Judgment of lower Court confirmed—Judgment debt remained unsatified—At later stage second appeal is brought by defendant against civil imprisonment order made by the Native Commissioner—Onus on defendant to satisfy the Court in regard to his means—Onus not discharged.*

*Claim:*

1st action.—£433. 16s. 4d., being damages for wrongfully and unlawfully burning down of plaintiff's house and destroying plaintiff's property.

2nd action.—Judgment debt remained unsatisfied for a period of more than seven days and plaintiff applied for a decree of civil imprisonment against the defendant.

*Plea:*

1st action.—Denial.

2nd action.—That defendant does not have the means of satisfying the judgment debt either wholly or in part and either out of present means or out of future earnings or income.

*Judgment:*

1st action.—For plaintiff as prayed.

2nd action.—A decree of three months' civil imprisonment with costs, execution of which is suspended on condition that defendant liquidates the debt and costs of £144. 19s. 8d. in monthly instalments of £2. 10s., the first being payable before the 5th October, 1951, and subsequent ones by the 5th of each succeeding month thereafter.

*Appeal:*

1st action.—Irrelevant—merits of case not considered—application for condonation of late noting of appeal decided.

2nd action:—

(*a*) That the award is excessive.

(*b*) That the defendant's financial circumstances were not considered.

(*c*) That the appellant was not allowed normal living expenses.

*Held:*

1st action.—This is not a case in which the Court's indulgence can properly be sought to condone the late noting of the appeal. The application is refused with costs and the Native Commissioner's judgment is confirmed.

2nd action.—The onus is on the defendant to satisfy the Court in regard to his means. The amount of monthly instalment to be paid was fixed on his offer and statement and Court considers that he has no cause for complaint.

The appeal is dismissed with costs.

*Authorities:*

Gabazile Dhludhla *v.* Bizana Zungu N.A.C. (T. & N.), 45/1947.

Marsberg (President), delivering judgment of the Court:—

Mr. D. I. Gordon for appellant presents an application for condonation of the late noting of an appeal in the case from the Native Commissioner at Johannesburg in which John Ngwenya was plaintiff and Edward Kumalo, the defendant and appellant. Judgment in that case was given in favour of plaintiff on 2 November, 1950. A written judgment was given by the Native Commissioner on 18th November, 1950. Notice of appeal was dated 12th January, 1951, and lodged with the Clerk of the Court apparently on 16th January, 1951. It will be seen that the appeal was noted 70 days after judgment. *According to the rules an appeal must be noted within* 21 *days after judgment.*

In the affidavit submitted by appellant, Edward Kumalo, the grounds for applying for condonation are stated as follows:—

6

"On the date when judgment in the action was delivered by the Native Commissioner's Court the applicant discussed with Attorney D. I. Gordon the advisiability of appealing and was informed that before expressing an opinion application should be made for the Commissioner's Reasons for Judgment.

7

On or about the 7th November, 1950, the applicant through his attorney applied in due form for the Commissioner's Reasons which reasons were consequently furnished on the 18th November, 1950, but were only received on the 27th November, 1950, at which time the 21 days allowed for noting of an appeal had expired.

8

On or about the 3rd day of November, 1950, Edward Kumalo received a letter from his attorney Mr. E. Gordon, dated 27th November, 1950, informing him that the reasons for Judgment had been furnished.

9

On the 4th day of November, 1950, applicant interviewed Mr. E. Gordon and he was informed that the time for noting an appeal had expired and that application would have to be made for condonation and that if applicant wished him to proceed accordingly provision had to be made for costs and for security. Applicant agreed to make provision and on the

same day a letter was written to respondent's attorneys informing them that applicant intended to appeal and to apply for condonation.

10

Applicant returned to his home and at his first available opportunity paid into attorney E. Gordon's office the sum of £8.

11

During the latter portion of December the applicant called at the office of attorney E. Gordon to ascertain progress and was informed that he was away on holiday. On or about the 27th December, 1950, his attorney being still away applicant called on attorney D. I. Gordon who informed him that no application had been made or appeal noted as he had not been instructed to do so. It then became apparent that the payment which was intended to be in respect of appeal was by mistake taken on account of another indebtedness and that as a consequence no steps had been taken.

12

Applicant respectfully further submits—

(*a*) that it was never his intention to abandon his original decision to appeal and that there was no deliberate omission on his part;

(*b*) that the record in the case is a lengthy one and that in the nature of the action the Native Commissioner's reasons for judgment has an important bearing on applicant's decision to appeal or otherwise;

(*c*) that the Respondent has a reasonable prospect of success on the merits of the action and in regard to damages awarded by the Court *a quo*;

(*d*) that the judgment is a final one involving a considerable sum to applicant."

The grounds for the application, viz.: Provision to be made for security and costs, the attorney being away on holiday and that the noting of the appeal would depend largely on the reasons for judgment given by the Native Commissioner are not valid grounds to justify delay in the noting of an appeal. Prior decisions of the Native Appeal Courts indicate that applications based on these grounds are not favourably entertained. Other decisions also point out that despite faulty reasoning or inelegantly framed reasons for judgment, judgments on the substantive claims are frequently correct. The prime duty of an Appeal Court is to ensure that the judgment itself is correct, and to that end consideration is directed to the evidence recorded. Errors of judgment in assessing the value of the evidence or the inferences drawn are not necessarily fatal.

The applicant alleges that he has a reasonable prospect of success on the merits of the action and in regard to the damages awarded by the trial court, and that the judgment is a final one involving a considerable sum to applicant. He does not state, however, on what grounds he expects to succeed. Despite the very lengthy trial, the record being 125 pages typed, the issues before the Native Commissioner were very simple.

Was plaintiff's house and property unlawfully and deliberately burned and was the defendant the person who was responsible for the burning?

From the record itself it is abundantly clear that the house and property were so burned.

Appellant's defence at the trial was an alibi, viz. that he was injured and was not present at or responsible for the burning. Yet arising out of this very incident he and others were charged in a Criminal Court with public violence.

The record of that trial was admitted in the subsequent civil case now before us. It is competent to take notice of the nature of the charge and the plea tendered by applicant, the accused

in the criminal case. The charge of public violence, *inter alia,* incorporated the burning of the plaintiff's property as an element of the public violence. Now, applicant, the accused, pleaded guilty of that charge. He was defended by an advocate, duly instructed by his attorney. In evidence in the civil case relating to this charge and the plea, applicant stated that the charge had not been explained to him and that he pleaded guilty to protect his followers. We must frankly state that we do not believe that in a public prosecution of this nature the accused was left in ignorance of the proceedings or that he did not know what the nature of the charge was. To believe otherwise would cast doubt on the integrity of the attorney and counsel who appeared for him and would cast a reflection on the fairness of the trial court. Applicant's plea in the criminal trial can be construed only in one way; that he well knew what he was facing and confessed to the commission of the crime. In other words he admitted that he was responsible for the burning down of plaintiff's house and posses ions. In the light of this admission applicant's subsequent defence of an alibi in the civil case rings false. With this vital impediment in his case we cannot see on what grounds the applicant can hope to succeed on appeal. Common sense would indicate that in the burning of a house and property considerable damage would be caused.

In our opinion this is not a case in which our indulgence can properly be sought to condone the late noting of the appeal.

The application is refused with costs, and the judgment of the Native Commissioner is confirmed.

JOHANNESBURG: 23rd October, 1951. Before H. W. Warner, Esq., Acting President. Messrs. H. G. F. Towne and J. C. Venter, Members of the Court (Central Division).

Warner (Acting President), delivering the judgment of the Court:—

On the 2nd November, 1950, plaintiff obtained judgment against Defendant for £120 in respect of damages caused to his house and belongings. The judgment debt remained unsatisfied for a period of more than seven days and plaintiff applied for a decree of civil imprisonment, against defendant.

Defendant opposed the decree on the ground that he has no means of satisfying the judgment debt either wholly or in part and either out of present means or out of future earnings or income.

In order to prove to the satisfaction of the Court that he had no means of satisfying the judgment debt, defendant gave evidence but did not call any other witnesses.

The Native Commissioner gave the following judgment: A decree of three months' civil imprisonment is granted, with costs, the execution of same to be suspended on condition that he liquidates the judgment debt and costs of £144. 19s. 8d. in monthly instalments of £2. 10s. the first being payable before 5th October, 1951, and subsequent ones by the 5th of each succeeding month thereafter.

An appeal was noted by defendant's attorney in the following terms: Kindly take notice that the appellant hereby appeals against the award by the Native Commissioner of Johannesburg on the 29th August, 1951, on the following grounds:—

(*a*) That the award is excessive in the circumstances.
(*b*) That the Native Commissioner erred in failing to consider the appellant's financial circumstances when making the award, or alternatively:
(*c*) That the Native Commissioner did not allow normal living expenses to the appellant when making the award.

The notice of appeal is rather vague as it does not state what "award" is appealed against but it would appear that it was not intended to appeal against the decree of civil imprisonment

but only against the terms of suspension on the ground that the monthly instalments of £2. 10s. which defendant is required to pay are excessive.

Defendant stated that his monthly income was £13 and his commitments £6. 5s. 8d. per month. He did not state what his living expenses were but offered to liquidate the debt by instalments of from 5s. to 10s. per month. Afterwards he admitted that his income in £15 and not £13 per month as previously stated. In view of this and his offer, the Native Commissioner fixed the instalments at £2. 10s. per month.

The onus was on defendant to satisfy the Court in regard to his means. The amount of monthly instalment to be paid was fixed on his offer and statement and we consider that he has no cause for complaint.

The appeal is dismissed with costs.

For Appellant: Mr. E. Gordon, P.O. Box 905, Johannesburg.

For Respondent: Mr. H. Helman of Messrs. Helman and Michel, P.O. Box 3592, Johannesburg.

## LOBOLA: CLAIM FOR RETURN.

CASE No. 10 OF 1951 (JOHANNESBURG).

**IZAK SEFOLOKELE** *v.* **JACOBA THEKISO.**

JOHANNESBURG: 5th June, 1951. Before H. F. Marsberg, Esq., President, and Messrs. D. S. Cooke and R. L. Eaton, Members of the Court (Central Division).

*Claim by deceased husband's brother for return of wife, failing which return of lobola—Customary union disputed—Essentials of valid customary union—After husband's death, brother cannot claim similar rights which the husband would have had for the return of his wife and children—Effect would be to regard wife and children as chattels—Husband's people can claim refund only when the widow remarries—Claim is therefor premature.*

*Claim:* (*a*) An order for the return of a woman named Albertina to his kraal or, failing compliance therewith, payment of an amount of £20, being lobola paid less deductions, (*b*) custody of two minor children, (*c*) alternative relief, and (*d*) costs of suit.

Plaintiff alleges that he is the brother of the late Piet who contracted a customary union, with a woman named Albertina who has maliciously deserted from his kraal.

*Plea:* Denial that a customary union has taken place.

*Judgment:* For plaintiff as prayed with costs.

*Appeal:* That the judgment is against the evidence and weight of the evidence.

*Held:* The appeal is allowed with costs and the judgment of the Native Commissioner is altered to read: For defendant with costs.

*Authorities:*

(1) Mothombeni *v.* Matlou, 1945, N.A.C. (N. & T.), 123.
(2) Mbono *v.* Manxoweni, 6, E.D.C., 71.
(3) Desemele *v.* Sinyako, 1944, N.A.C. (C. & O.), 17.

Marsberg (President), delivering the judgment of the Court:—

Plaintiff sued defendant in the Court of the Native Commissioner, Johannesburg, for (*a*) an order for the return of a woman named Albertina to his kraal, or, failing compliance therewith, payment of an amount of £20, being lobola paid less deductions, (*b*) custody of two children, (*c*) alternative relief, and (*d*) costs of suit.

He alleged that he is the eldest brother of the late Piet Thekiso, who contracted a Native customary union with the woman named Albertina and paid £30 as lobola in respect of the union, that Albertina was duly handed over to Piet as his wife, that two children were born of the customary union and that Albertina has maliciously deserted from the kraal of the said Piet Thekiso and is residing with defendant, her eldest brother.

In his plea, defendant denied that a customary union had taken place as alleged, stating that Albertina was never handed over to Piet Thekiso as his wife.

After hearing evidence the Native Commissioner gave judgment for plaintiff as prayed with costs and defendant has appealed on the ground that the judgment is against the evidence and the weight of evidence.

It is common cause that the late Piet Thekiso caused the pregnancy of Albertina, that the late Daniel, father of Piet, entered into negotiations with defendant, who agreed that a customary union between Piet and Albertina should take place on payment of a sum of £30 as lobola, that this amount was duly paid and that Albertina gave birth to two children of which the late Piet is the father. One of plaintiff's witnesses states that £10 was paid before the death of Piet and £20 thereafter and defendant states that the full £30 was paid during the lifetime of Piet.

It has been held on numerous occasions that the requisites of a valid Native customary union are the consent of the two groups, the passing of cattle or their equivalent and the transfer of the woman.

In the present case, the presence of the first two requisites is admitted so that it only remains to be decided whether there has been a transfer of the woman.

In the case of Mothombeni v. Matlou, 1945, N.A.C. (N. & T.), 123, it was held that, where the proposed husband, after the agreement in regard to lobola, lived with the woman with the knowledge of her people, this fact is an indication that the woman's father agreed to transfer the woman tacitly, if not directly.

In the present case, plaintiff states that, after lobola was paid, Piet and Albertina lived together at the Power Station, Randfontein. Albertina states that she was working at Robinson and that Piet worked at 3 North Shaft and lived in the Millsite Compound and visited her at her place of employment where he made her pregnant. She admits, however, that she visited plaintiff's people on several occasions, staying for about a month at a time and that on one of these occasions, after Piet's death, she was provided by plaintiff's wife with mourning clothes and took part in a mourning ceremony for Piet. Defendant admits that Albertina went to plaintiff's kraal with his consent for the mourning ceremony.

We are satisfied that Albertina regarded herself as Piet's wife and that defendant also regarded her as such.

Although we find that the Native Commissioner was correct in finding that a customary union existed between Piet and Albertina, this does not mean that plaintiff is entitled to a refund of the lobola paid, merely on the ground that Albertina is not

residing at his kraal. The Court and the parties do not appear to have appreciated the complication arising from the fact that Piet, the husband of Albertina, is dead. The case now does not involve the protection of the marital rights of the spouses. Summons has been issued by the eldest brother of the deceased, Piet, claiming similar rights which the husband would have had for the return of his wife and children. It has the effect of regarding the widow and children as chattels. This Court's attitude in regard to a matter of this nature was discussed in the case of Johanna Ramano and Jospeh Ramano *v.* Philip Mapula heard before us on 16th October, 1950 (Johannesburg case).

Now, in the case of Mbono *v.* Manxoweni, 6, E.D.C., 71, it was ruled that a widow, being a major, was free to go where she pleased after the death of her husband without committing her family to a refund of her lobola. In the case of Desemele *v.* Sinyako, 1944, N.A.C. (C. & O.), 17, it was held that the husband's people can claim a refund of the lobola only when the widow remarries. This means that, in the case before us, plaintiff's claim is premature.

The Native Commissioner has awarded plaintiff custody of the two children but there is no indication on the record as to the custom practised by the parties in regard to this matter.

The appeal is allowed with costs and the judgment of the Native Commissioner is altered to read: For defendant with costs.

At the outset application for condonation of the late noting of the appeal was made. In view mainly of the important issues involved in this case relating to persons we have allowed the application. We must reject the main argument put before us that appellant's have the right to note an appeal within 14 days of the date of receipt of a written judgment asked for. There is no such provision in the Rules. An appeal must be noted within 21 days of the date of judgment. There can be no objection to an appellant submitting subsequently an amended notice of appeal in the light of the written judgment. Such amended notice must be submitted to the judicial officer for any further supplementary reasons for judgment he may desire to furnish, if he wishes.

For Appellant: Mr. D. I. Gordon for Mr. E. Gordon, P.O. Box 905, Johannesburg.

For Respondent: Mr. Jacobson of Messrs. Sapire & Jacobson, Johannesburg.

## AGENCY: AGENT ACTING FOR DISCLOSED PRINCIPLE.

CASE No. 11 OF 1951 (JOHANNESBURG).

**WILLIAM NGWABENI *v.* PAULUS MASEKO.**

JOHANNESBURG: 7th June, 1951. Before H. F. Marsberg, Esq., President, and Messrs. D. S. Cooke and R. L. Eaton, Members of the Court (Central Division).

*Cancellation of sale—Principal agrees to cancellation—Purchaser sues selling agent for return of amount paid—Onus on plaintiff to prove* vinculum juris *between himself and defendant—Onus not discharged—Defendant as agent not liable to refund money to plaintiff.*

*Claim:* Return of £110 paid to selling agent on account of purchase price of £560 for certain stand at Evaton. Seller agreed to cancellation of sale and authorised plaintiff to uplift the said amount of £110 from the seller's agent who is defendant in this case.

*Plea:* Defendant admits receipt of the money but pleaded that in terms of a contract of agency he became entitled to retain the money as commission for effecting the sale.

*Judgment:* For plaintiff as prayed with costs.

*Appeal:* That the judgment is against the evidence and weight of the evidence, defendant at all times acted as an agent for a disclosed principal and as such there was no *vinculum juris* entitling plaintiff to sue him for the relief which was claimed in the summons.

*Held:* Plaintiff has failed to prove any *vinculum juris* between himself and defendant. As agent defendant is not liable to refund the money to plaintiff, the appeal is allowed with costs and the judgment of the Native Commissioner is altered to read: For defendant with costs.

*Authorities:* De Villiers and Macintosh's Law of Agency in South Africa—p. 221.

Marsberg (President), delivering judgment of the Court:—

Plaintiff sued defendant in the Court of the Native Commissioner, Johannesburg, for £110. In his particulars of claim he alleged that, on the 20th May, 1949, he entered into an agreement of sale with one Elias Nyembe whereunder it was agreed that plaintiff should purchase certain Freehold Stand No. 1421, Evaton, for £560; that he paid £110 to defendant who was the selling agent for Elias Nyembe; that on the 29th September, 1950, Elias Nyembe agreed to cancel the sale and authorised plaintiff to uplift the amount of £110 from defendant but the latter refused to refund it.

Defendant admitted receipt of the money but pleaded that in terms of a Contract of Agency he became entitled to retain the money as commission for effecting the sale.

The Native Commissioner gave judgment for plaintiff as prayed with costs and defendant has appealed on the grounds that the judgment is against the weight of evidence in that, defendant has at all times acted as an agent for a disclosed principal and as such there was no *vinculum juris* entitling Plaintiff to sue him for the relief which was claimed in the summons.

It is common cause that plaintiff agreed to purchase the property for £560 and paid £110 on account thereof to defendant as agent of Elias Nyembe. Defendant states that Elias Nyembe wanted £400 for the property and agreed that any sum over that amount obtained by defendant would be the latter's commission. Defendant admits that Elias Nyembe told him that plaintiff was cancelling the Deed of Sale. He does not deny that Elias agreed to the cancellation.

The following passage occurs on page 221 of De Villiers and Macintosh's Law of Agency in South Africa: "An Agent does not become liable or accountable to a third person in respect of money in his hands by reason of the fact that he has been instructed by his principal, or is under a duty to his principal, to pay over the money to that third person. But he will be so liable or accountable if he has promised the third person to pay over the money to him, or to deal with it on his instructions; or if the principal has ceded his right to the money to the third person. Mere indication of the agent as a source of payment will not amount to such cession or give the third person any right against the agent in the absence of a promise, express or implied, by the latter".

There has not been a cession of action to plaintiff by Elias Nyembe so plaintiff can succeed in his action against defendant only if he can show that the latter promised to pay the money over to him. The onus of proof in this respect rests on plaintiff.

Plaintiff states in his evidence: "I went to defendant and demanded the money I had paid. He said that he had the money and he took me to a European who may have been an attorney.

He agreed to refund the money to me. He said he will come to me as soon as he has the money". Defendant does not deny specifically that he promised to pay the money but states in his evidence: "Money paid by the purchaser I held. Elias said the first money paid would be my commision. Purchaser never came and saw me after he saw the seller".

This is all the evidence on this point. It would require strong evidence to discount the general exemption of agents from liability to account to third persons. The onus of proof of a promise by an agent to pay over to the third person would rest on the latter. In this respect we feel that on the evidence plaintiff has failed to discharge the onus. There is merely his statement that defendant promised to refund the money against defendant's denial. In the circumstances the appeal must be upheld because plaintiff has failed to prove any *vinculum juris* between himself and defendant. As agent defendant is not liable to refund the money to plaintiff.

The appeal is allowed with costs and the judgment of the Native Commissioner is altered to read: "For defendant with costs".

For Appellant: Mr. Adv. D. O. Vermooten, instructed by Mr. van Leggelo.

For Respondent: Mr. J. Fine, Johannesburg.

## AGREEMENT: JOINT OWNERS.

CASE No. 12 OF 1951 (JOHANNESBURG).

**GILBERT SIBANYONI** *v.* **SIMON SIBANYONI.**

JOHANNESBURG: 8th June, 1951. Before H. F. Marsberg, Esq., President, and Messrs. D. S. Cooke and R. L. Eaton, Members of the Court (Central Division).

*Agreement—Joint owners—Statement and debatement of account—Claim for payment of all rentals due—Appeal on fact and credibility of witnesses—Lack of precision in plaintiff's claim resulting in unnecessary investigation to elucidate the position between the parties—Order of costs granted for plaintiff in lower Court amended to one of no order as to costs.*

*Claim:*

(*a*) Statement of account.
(*b*) Debatement thereof.
(*c*) Payment of all rentals collected by defendant since August, 1949.
(*d*) Payment in the sum of £62.
(*e*) Costs of suit.

*Plea:*

1. Admits the joint ownership of the property.
2. Denies alleged agreement; he had in fact accounted to plaintiff for his share of the moneys; supplied plaintiff with a statement of account.
3. Denies all other allegations after amendments.

*Judgment:* For plaintiff for £19 and payment of all money rentals as collected by the defendant accruing from the property as from the 1st August, 1949. Defendant to pay costs.

*Appeal:* On fifty-four grounds of which most of them are matters of argument and falling under the heading:—

The judgment is against the evidence and the weight of evidence.

*Held:* The appeal is dismissed with costs.

*Authorities:* Nil.

Marsberg (President), delivering judgment of the Court:—

In the Native Commissioner's Court at Johannesburg plaintiff, Simon Sibanyoni sued defendant Gilbert Sibanyoni for—

(*a*) a statement of account in respect of certain property duly supported by vouchers;
(*b*) debatement thereof;
(*c*) payment of all rentals collected by defendant since August, 1949;
(*d*) payment in the sum of £62;
(*e*) costs of suit.

The particulars of claim as amended and amplified read as follows:—

(1) The plaintiff and the defendant are the joint registered owners in equal shares of certain immovable property situate in Kliptown in the District of Johannesburg.
(2) The defendant is obliged to render to plaintiff a statement of account of all rentals as collected by him from 1*st August*, 1949, which rentals are due and payable to the plaintiff.
(3) Notwithstanding demand, defendant has failed to render to the plaintiff a proper statement of account duly supported by vouchers as he was obliged to do, or to pay to him the moneys due thereunder.

In reply to a request for further particulars in relation to the original paragraph 3 of the summons which was deleted during the course of the proceedings, the plaintiff stated in reference to an alleged agreement:—

"The agreement was verbal and the terms thereof were that defendant would collect the rentals from all tenants for a period of 4 years commencing middle of winter 1945, and that thereafter plaintiff would become entitled to collect all rentals for a similar period of 4 years, and that it was further agreed that defendant would pay over to plaintiff a sum £62 from the rentals as had been collected by him." (NOTE.—This statement of further particulars was substituted for the original which was deleted during the course of the proceedings.)

Defendant pleaded as follows:—

(1) He admitted the joint ownership of the property.
(2) He denied an alleged agreement between the parties but stated that from September, 1946, to August, 1949, he had in fact accounted to plaintiff for his share of the moneys derived from the property and on 3rd November, 1949, supplied plaintiff with a statement of account as per copy supplied on that date and further that he is not indebted to plaintiff in any amount whatsoever.
(3) After the amendments, he denied all further other allegations.

In asking for amendments to the summons at the end of plaintiff's examination in chief the plaintiff has left the issues as recorded above somewhat confused. To make sense of the claim and to disclose a cause of action it is necessary to read together the particulars of claim and the further particulars supplied and to include missing words to the effect: "There was an agreement between the parties in relation to their joint affairs".

The original claim was for a statement of account, debatement and payment of moneys due. The substituted claim is for statement of account, debatement, payment of rentals collected since August, 1949, payment of £62 and costs.

It is most unfortunate that the issues were not clearly and simply defined before the parties went to trial. For instance, it was not until the plaintiff had given evidence that it became clear in what way the alleged agreement was broken, or what was the significance of the sum of £62. The bulky record which is before us indicates that there has been much unnecessary investigation into irrelevant matters owing to the confused nature of the claims. The claim for a statement of account and debatement appears to have lost itself in the course of the proceedings. The trial appears to have assumed the character of a preparatory examination without a definite aim but by process of elimination to ascertain the balance as between the parties. In other words the affairs of the parties were debated before the Native Commissioner whereas what was sought was an order for such debatement. Fortunately for litigants in Courts of Native Commissioner irregularities in proceedings are not necessarily fatal. Substantial prejudice must occur before we as a Court of Appeal can intervene. We shall endeavour to do justice as between the parties but we propose to exercise our discretion in regard to costs to mark our displeasure at the lack of precision in this case.

According to the evidence plaintiff relies on two matters as being in dispute between him and defendant. He says: "I am now claiming payment of all rentals collected by defendant from 1st August, 1949, and payment of a sum of £62". The first claim is based on an alleged verbal agreement in regard to which he says: "The defendant and I reached an agreement whereby he would be entitled to collect the rentals of all the rooms for a period of 4 years and that such moneys collected were to be used to pay me a sum of £62 which he owed me. It was further agreed that after the expiration of those 4 years, I would then become entitled to collect the rentals also for a period of 4 years. We reached an understanding that he would pay me a sum of £62 which he owed me and that he would be entitled to retain the balance of the rentals for those 4 years. We merely agreed that he would pay me a lump sum of £62 from the rentals as collected by him for the 4 years, and that he would be entitled to retain the balance of moneys as received by him. When we entered into the actual agreement, the amount of £62 was not discussed then. The amount of £62 was discussed in 1945."

According to plaintiff's own version of this transaction there was no obligation on defendant to account for the rentals collected during the first four years of the alleged agreement. Plaintiff clearly admits that defendant was entitled to retain such collections. The statement of account furnished by defendant on 3rd November, 1949, roughly covering the period in question is therefor of no effect on this issue.

The amended claim is now for payment of all rentals collected by defendant since August, 1949. That, of course, is based on the terms of the alleged agreement. Was there an agreement? We have above the terms of the agreement as defined by plaintiff. In his plea defendant denied there was an agreement between the parties but in evidence he states: "We came to an agreement that the rentals as collected from the rooms let on our property would be used to first purchase a property for the one and thereafter, after that had been paid for, the rents would be used to purchase a property, until paid for, for the other one of us. There were no other terms of or conditions to our agreement. Our original true agreement was that the rents as collected by me would be utilized to first purchase another stand for one of us and after that had been paid for, a further stand would be purchased for the other one in turn. The plaintiff was not entitled to demand any moneys from me at that stage (i.e. January, 1949, when the parties separated) because our agreement had not yet expired, as I had not yet purchased my place in terms of our agreement."

We have, therefore, a clear statement from both parties that there was an agreement between them. The terms are similar in the respect that each one was to benefit in turn. There is divergence in regard to the manner in which the benefit would accrue. Plaintiff claims that each in turn was to collect all the rentals for a period of four years. Defendant states that a property was to be bought in turn for each from the rentals. The Native Commissioner has believed the plaintiff on this point. In our view of the evidence and in the light of argument before us we are of opinion that the Native Commissioner was amply justified in doing so. There are many instances of defendant's endeavour to set off against the rentals collected, debits to plaintiff in respect of items which could not fall within the scope of their joint and equal ownership of the property. He claims credit for services and contributions rendered to his father, who he states died in 1938, at a time when he was a youth of 17 years or younger and under guardianship. "I also expended some money on plaintiff whilst he was attending school at Kliptown during 1939." Defendant was then 18 years old and both would be under guardianship. From the evidence it is clear that defendant has been collecting rentals from the time of the acquisition of the property in 1945; yet, as part of his defence, he endeavoured to show that plaintiff also collected rentals for a period. His venture along this line was not too happy, and his choice of witnesses not very fortunate. We are satisfied that of the two versions the plaintiff's is the more probable. Defendant has admittedly been collecting the rentals for the period of four years. The Native Commissioner has found his credibility to be questionable, and there is only his word to support the numerous claims of set off against plaintiff. Defendant himself admits that he was of mind that plaintiff was making quite a lot of money. Plaintiff was therefore not in need of support.

On the issue, then, of the agreement, we are satisfied that the Native Commissioner was justified in accepting plaintiff's version and giving judgment for plaintiff for payment of all rentals from 1st August, 1949.

On the claim for £62 the matter is not so clear. On this item the judgment was for plaintiff for £19. £62 was stated by plaintiff to represent £40, the purchase price of the property and £22 for the purchase of galvanised iron roofing, both of which sums plaintiff alleged he had paid. During the course of the proceedings he admitted he could reclaim only half, i.e. £31. It was also conceded by his counsel that half of two items of £14 for repairs undertaken by defendant and £10 fees paid to Messrs. Greenfield and Greenfield should be borne by plaintiff. With those deductions plaintiff's claim for £62 was reduced to £19, for which judgment was entered. The evidence for and against this item rested almost solely on the word of plaintiff and that of defendant. The Native Commissioner accepted the word of plaintiff on the general grounds of credibility. On a view of all the evidence tendered by the parties we cannot say that the Native Commissioner erred in believing plaintiff. On the record plaintiff's evidence certainly creates a more favourable impression than that of defendant.

An appeal has been noted by defendant against the Native Commissioner's judgment on fifty-four grounds. We do not propose to comment on these in detail because most of them are matters of argument which usually are comprised within the comprehensive heading "the judgment is against the evidence and the weight of evidence". The details are normally adduced in argument at the appeal stage. Faulty reasoning by a judicial officer is not necessarily inconsistent with his arriving at a correct decision. If, in spite of faulty reasoning, he arrives, in our view, at the correct solution the appeal could not succeed. We have viewed this case strictly on the evidence recorded and we are satisfied that the judgment is correct. The trial turned

mainly on questions of fact and credibility and we are of opinion that the Native Commissioner could reasonably have arrived at his decision.

The defendant has attacked the Native Commissioner for intervening in the conduct of the case and subjecting him to a merciless attack. We have commented on the confused nature of this case. We cannot express surprise that the judicial officer may have found it necessary to intervene to elucidate difficulties to his satisfaction. The questions asked by him appear to be mere repetition of evidence already given. We cannot detect that any improper or partial questions were asked by him. He has explained his criticism thus:—

> "It is not the function of the Court merely to record perfunctorily evidence as presented by the parties but to carefully and fully investigate any action brought before it in the interests of justice. The Court's investigation in this action was directed to that objective, and for no other purpose."

We accept the Native Commissioner's explanation. We feel that an attempt has been made to engraft far too much on a simple arrangement between the brothers, the parties to this action.

The appeal is dismissed with costs.

The Native Commissioner's judgment is confirmed but we order that there be no order as to costs in the lower Court. We make this order in regard to costs because of the lack of precision in plaintiff's claim, with the resultant unnecessary investigation to elucidate the position between the parties during the course of the proceedings.

For Appellant: Adv. D. D. Isaacs, instructed by Mr. H. W. Chain, 1105 Lewis & Marks Buildings, President Street, Johannesburg.

For Respondent: Adv. D. Spitz, instructed by Mr. H. M. Basner, Magor House, 74 Fox Street, Johannesburg.

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# RESCISSION OF DEFAULT JUDGMENT: REVIEW.

CASE No. 13 OF 1951 (BENONI).

**SOLOMON THANJEKWAYO** *v.* **N. C. H. NXUMALO.**

JOHANNESBURG: 21st June, 1951. Before H. F. Marsberg, Esq., President, and Messrs. E. V. C. Liefeldt and J. W. van der Watt, Members of the Court (Central Division).

*Application for rescission of default judgment—Review—Conflicting interdicts by different plaintiff's against same respondent —Native Commissioner who heard the application for rescission should have allowed evidence to be called.*

*Claim:* For an order declaring defendant to have sold the buildings on a certain site in the Benoni Municipal Location and ordering defendant to take steps and/or execute such documents as may be required by law in order to divest himself of all rights in favour of the plaintiff in and to the said building site and the permit in respect thereof and failing compliance therewith authorizing the Messenger of the Court to sign the said documents.

*Plea:* Nil.

*Judgment:* After a number of postponements judgment was eventually given against defendant who was then in default as follows:—

"For plaintiff by default as follows:—

An order declaring plaintiff to be the owner of the buildings on site 56, 13th Street, Benoni Location. Defendant to uplift sum of £200 paid into Court. Defendant to pay costs."

*Application:* To rescind the default judgment.

*Judgment:* Application refused.

*Appeal:* Bad in law and applies for review of proceedings.

*Held:* The parties should have been given the opportunity to state their opinion, the Native Commissioner erred in finding that the defendant was in wilful default and should have granted the application to rescind the default judgment.

The appeal is allowed with costs.

*Authorities:*

Hitchcock *v.* Raaf, 1920 (T.P.D.), 366.
Bertram *v.* Wood, S.C., 177.
McKeurten on Sale of Goods—3rd Ed.
Alfred Maqungo *v.* Samuel Marwede, 1938, N.A.C. (C. & O.), 223.
Newman *v.* Ayten, 1931, C.P.D.
Hendricks *v.* Allen, 1928, C.P.D., 519.
Chedburn *v.* Barkett, 1931, C.P.D., 423.

E. V. C. Liefeldt (Member), delivering majority judgment, Marsberg (President), dissenting:—

In this case a default judgment was entered against the defendant on Saturday, 10th February, 1951. On Monday, 12th February, 1951, an application to rescind this judgment was filed by the defendant. Various affidavits and letters were filed in support of the application and numerous replying affidavits for the respondent. For reasons which are explained in the record the application for rescission was heard by a judicial officer other than the one who granted the judgment by default. This application was refused with costs on the 19th March, 1951, without any evidence being called by either party.

The defendant noted an appeal dated the 17th March, 1951, which is recorded as received by the Court and security filed on the 28th March, 1951.

In addition to noting an appeal against the refusal of the aplication to rescind, the default judgment of the 10th February is also appealed against on various grounds and at the same time an application is made for the review and setting aside of certain proceedings on the 5th February, 1951, as well as the proceedings on the 10th February, 1951, on the grounds of irregularity or mistake.

We propose here to deal with the appeal against the refusal to rescind the default judgment which was granted in the absence of the defendant on the 10th February, and which finding it is alleged in the notice of appeal inter alia was bad in law because it is contended that the trial court should not have refused to hear evidence which was tendered for defendant and erred in coming to a conclusion solely on the averments in affidavits which disclosed a conflict on material points. In considering the contents of the affidavits filed in connection with this application it would appear that the defendant contended that he was not in wilful default on the 10th, and that he had a good defence to the action which he sets out, namely, that though he admits negotiations with the plaintiff no sale was concluded. In the replying affidavits it is contended that defendant was in wilful

default and had not a bona fide defence to the action which alleged an agreement of sale and prayed for an order to this effect.

On the affidavits alone therefore it must be assumed that the defendant had a bona fide and good defence on the pleadings which justified the matter going to trial. On this point there is further issue which strengthens his case, namely that it is admitted that at the time the default judgment was entered on the 10th an interdict against he same defendant in respect of the same property had previously been entered in favour of another plaintiff, James Sibonyone in a Case No. 5 of 1951 on the same day the 5th February, 1951. The effect of this interdict was an order of Court restraining the defendant from selling, alienating or disposing of the property to some other person in breach of an agreement of January, 1948, promising to sell it so the said James Sibonyone. It should be noted that although proceedings between the present plaintiff Solomon Thanjekwayo, Case No. 10 of 1949, appear to have commenced in Fabruary, 1949, the cause of action here arose in August, 1948, that is eight months after the cause of action in Case No. 5 of 1951. By a coincidence Mr. Attorney Baker who had all along been acting for Solomon in Case No. 10 was engaged in the absence of Mr. Attorney Basner to represent him in Case No. 5 of 1951 for James Sibonyone. After obtaining the interdict in this case on the 5th February, 1951, he drew the attention of the Court to the fact that the respondent was the same man as the defendant in Case No. 10 of 1949 and at this stage the record of Case No. 10 was secured and Mr. Baker promptly, *in limine,* asked for an interdict in this case as well, although the defendant was present he had apparently not been prepared to have to be faced with matters arising in Case No. 10 of 1949 which had previously been set down for hearing for the 12th February, 1951. The defendant had engaged no attorney in Case No. 5 of 1951, on the 5th February and consented to the interdict promising not to sell the property to any one but plaintiff James Sibonyone. He had, however, engaged Mr. Helman in succession to Mr. Slomowitz to appear for him in Case No. 10 of 1949 down for hearing on the 12th February. Mr. Helman did not appear as an attorney of record until the 12th but it is apparent from his affidavit and other statements on record that he was engaged by defendant for Case No. 10 before the 5th February, 1951. However, on the record of Case No. 10 the following appears under date 5.2.1951. Mr. Baker for plaintiff, defendant in person. "It is clear that defendant is endeavouring to sell the property to James Sibonyone—Mr. Baker applies for an order interdicting and restraining defendant from in any way disposing of the improvements on the said property to James Sibonyone or any other person pending the final decision in Case No. 10 of 1949. Order as requested granted." The record proceeds further presumably on the same date: "Court draws attention to the fact that the Native Commissioner will not be available on 12.2.1951, and as defendant states that he wishes to leave on holiday on 12.2.1951, case postponed by consent to 10.2.1951."

The position then on the 5th was that two conflicting interdicts against the same respondent were in operation in favour of two different plaintiffs. On the 10th February, 1951, Mr. Baker appeared for plaintiff and defendant is recorded as in default. The Native Commissioner then surprisingly proceeded to hear the plaintiff's evidence and recorded the following judgment by default: "An order declaring plaintiff to be the owner of the buildings on Site No. 56, 13th Street, Benoni Location". It is observed that no indication appears on the record what defendant's reaction was on the 5th to the proposal to change the date of hearing of Case No. 10 of 1949 from the 12th to 10th but the affidavits and letters filed supply conflicting information mostly *ex parte.*

The defendant's version briefly is that Mr. Slomowitz had been acting for him but during January, 1951, he consulted Mr. Helman who was leaving for a vacation but agreed he would appear for him on the 12th February, 1951, in Case No. 10 of 1949. He goes on to say that on the 5th February, 1951, whilst at Court in connection with Case No. 5 of 1951, he was requested to attend Court on Saturday, 10th February, 1951, in Case No. 10 of 1949, but informed the Court that he would not be able to do so but would attend Court with his attorney on the 12th February, 1951. He attended on that day and was informed that a default judgment had been granted on the 10th. An affidavit by Mr. Attorney Helman confirms the set down for the 12th and states that he was about to go on vacation when defendant first consulted him and after he had communicated with the Clerk of the Court and confirmed this date he instructed defendant to obtain copies of the relevant documents and pleadings and promised to appear for him on the 12th. The affidavits by Mr. Attorney Baker, the Native Commissioner, and other officers of the Court all suggest that the defendant in fact agreed on the 5th to appear on the 10th instead of the 12th and further that his attitude on the 5th was defiant. Mr. Baker in his affidavit alleges the defendant said he would not bring an attorney to this Court but would obtain one in the High Court. This attitude of the defendant is difficult to follow if he was correctly understood by Mr. Baker and others since he claims to have already engaged Mr. Helman to appear on the 12th. We find some difficulty in coming to a conclusion on the points of conflict between the various affidavits. It is true that an Appeal Court should not as a rule question the bona fides of Court officials and the correctness of Court records but in dealing with Natives the possibility of mistake, misunderstanding and ignorance is always present. For this reason alone we feel that the Native Commissioner who heard the application for rescission erred in not allowing evidence to be called when he was faced with conflicts in the affidavits. There is for example the very strong probability that on the 5th February both Mr. Baker and the Court overlooked the fact that the cause of action which prompted the application for an interdict in Case No. 5 of 1951 by James Sibonyone predated that of the cause of action giving rise to the summons by Solomon Thanjckwayo. It was undoubtedly this misapprehension which actuated Mr. Baker in asking for an interdict in Case No. 10. It is most improbable that the Court would have granted the interdict on the 5th and the subsequent default judgment on the 10th in favour of Solomon had it realised at the time that the claim of James was based on a prior agreement to that of Solomon. It is quite true that the defendant has apparently attempted to conceal his association with the one plaintiff from the other plaintiff and he did not raise the question of the option given to James Sibonyone in his pleadings against the claim of Solomon, but it is observed that the summons and plea in Case No. 10 of plaintiff Solomon were amended twice. Summons was issued in Case No. 10 on the 7th February, 1949, and was first set down for hearing on the 12th April, 1949. Since then it has been postponed no less than ten times until the final set down for 12th February, 1951, and then this date was anticipated and amended to the 10th February, 1951. During this period the defendant's attorneys were Mr. Slomowitz then Mr. Seligman, again Mr. Slomowitz and finally Mr. Helman. The 5th and 10th appear to be the only occasions when defendant had no attorney.

We have indicated that we propose considering first the question of whether the Native Commissioner was correct in refusing the application for rescission of the judgment given by default. On this point we are guided by the case of Alfred Maqungo *v.* Samuel Marwede, N.A.C., Cape and O.F.S., 1938, page 223, which quotes Newman *v.* Ayten, 1931, C.P.D., 454 and Hendricks *v.* Allen, 1928, C.P.D., 519, and the remarks of Gardner J.P. who makes the following apposite remarks: "It is a very drastic

provision in our Magistrate's Courts which enables judgment to be taken by default, and Magistrates should not refuse to re-open where there is a doubt as to whether the default may have been otherwise than wilful, they should lean rather towards opening than towards refusing."

In Chedburn *v.* Barkett, 1931, C.P.D., 423, the following remarks appear "Default is only wilful if he knows what he is doing and is indifferent to the consequences of his default".

Applying these remarks to the present case, we hold the view that the Native Commissioner who considered this application should have had some doubts in view of the circumstances, that the defendant really intended to consent to the change in the date of hearing from the 12th to the 10th and that even if he did then his subsequent actions indicated the opposite of indifference to the consequences of his default, and here again one may quote Gardner J.P. in Newman *v.* Ayten when he remarked "A Magistrate should be in favour of allowing a defendant to purge his default". If these views apply to Europeans in a Magistrate's Court, how much more so in Native cases. We are of course conscious of the fact that the defendant may be largely to blame for the predicament in which he has placed himself and he may have some difficulty in evading a claim for damages but the rescission of the default judgment certainly affords the defendant a full opportunity to defend the respective claims without prejudicing the rights of any who may have a preferential claim against him.

There can be no doubt that the interdict in favour of Solomon Thanjekwayo of the 5th February and the default judgment of the 10th February were both in conflict with the prior undischarged interdict granted in favour of James Sibonyone also on the 5th February and whose cause of action arose prior to that of Solomon. This may not have been recognised as a patent error at the time, but it was raised as a ground for rescission in the second Notice of Application to rescind, filed by the defendant on the 26th February, 1951, and was therefore before the trial court at the hearings on the 5th and 9th of March.

This application which could and has been brought under section *fifteen* of Act No. 38 of 1927, direct to this Court might justify a review and setting aside of the judgment and proceedings of the 5th and 10th February, 1951, on the grounds of an irregularity or mistake. But the correct procedure was followed in raising the matter in the application to rescind in terms of section 30 (2) of the Native Commissioner's Court Rules.

The Native Commissioner who presided at the trial of the application to rescind found inter alia that the proceedings of the 5th and 10th February were not irregular, that the default judgment could not be challeged, and that the defendant's default was wilful. In his reasons he explains that he has been guided by the decision in Izak Thabeni *v.* Daniel Sisilana, 1948, page 14, Native Appeal Court, Central Division. He apparently did not consider the question of possible mistake.

In view of the provisions of section 30 (2) of the regulations for Native Commissioner's Courts which provide that "The Court may rescind or vary any judgment granted by it which was void *aborigine,* or was obtained by fraud or by mistake common to the parties", we must assume that the remarks of the learned President that "there is a presumption of law that a judgment of a competent Court is correct excludes every proof to the contrary" was intended to refer to attempts to obtain the rescission of judgments on the merits, questions of law or other grounds more properly dealt with by way of appeal but does not affect special applications under the regulation quoted.

To decide the point of possible mistake or error it would appear necessary that the judicial officer presiding on that occasion and the parties should have been given the opportunity to state their opinion on the effect of the alleged prior agreement of

James Sibonyone which has not yet been contested. Apart from this and other grounds of appeal or review, however, we have intimated that the Native Commissioner erred in finding that the defendant was in wilful default and should have granted the application to rescind the default judgment of the 10th February, 1951.

The appeal is allowed with costs.

E. V. C. LIEFELDT, *Member.*

I concur.

J. W. VAN DER WATT, *Member.*

H. F. Marsberg (President), dissentiente:—

On the 7th February, 1949, plaintiff, Solomon Thanjekwayo sued defendant, N. C. H. Nxumalo in the Native Commissioner's Court at Benoni for an order declaring defendant to have sold the buildings on a certain site to plaintiff and ordering defendant within such time as may be fixed by the Court to take all steps and/or execute such documents as may by law be required in order to divest himself of all rights in favour of the plaintiff in and to the said building site and the permit in respect thereof and failing compliance therewith authorizing the Messenger of the Court to sign the said documents.

Defendant was represented by two different attorneys at various stages. After a number of postponements judgment was eventually given on 10th February, 1951, against defendant, who was then in default, as follows:—

"An order for plaintiff by default as follows: An order declaring plaintiff to be the owner of the buildings on Site No. 56, 13th Street, Benoni Location. Defendant to uplift sum of £200 paid into Court. Defendant to pay costs."

Defendant has lodged a notice of appeal and review in the following terms:—

Please take notice that defendant notes an appeal against the default judgment delivered herein on the 10th of February, 1951, on the ground that the said judgment is bad in law for the following reasons:—

(*a*) The said judgment is irregular.
(*b*) The said judgment is not a competent judgment in terms of the pleadings.
(*c*) The said judgment is void *aborigine* and/or granted by mistake common to the parties, and/or patently and/or erroneously recorded.

In noting the above appeal, defendant also applies to bring into review:—

(*a*) The proceedings of the 5th of February, 1951, on the ground that the said proceedings constitute an irregularity.
(*b*) The proceedings on the 10th of February, 1951, on the ground that the said proceedings constitutes an irregularity.
(*c*) The entering of the judgment as recorded constituted an irregularity.

The appellant attaches hereto an affidavit in support of such review proceedings, and prays that the proceedings may be reviewed.

Appellant also notes an appeal against the judgment of the Native Commissioner on the 9th of March, 1951, in which the applications to rescind and set aside the judgment entered on the 10th of February, 1951, were dismissed, the finidng on which said judgment was based being bad in law for the following reasons:—

(*a*) The judgment granted on the 10th of February, 1951, was in fact and in law void or patently erroneous.
(*b*) The facts deposed to by the applicant with the supporting affidavits placed before the Court certain issues which could not have been decided by the Native Commissioner

to have been incorrect or wrong, without ordering the trial on the issue raised in the affidavits and replying affidavits.

(*c*) As the Native Commissioner held that he could determine the correctness of the alleged disputed facts from the affidavits without the need for calling evidence, the defendant has not been afforded the opportunity of substantiating his allegations.

(*d*) The learned Native Commissioner should have rescinded the judgment granted on the 10th of February, 1951.

This Court is unable to hear argument on the appeal against the default judgment delivered on 10th February, 1951. It has already laid down in several cases, and in particular in the case of Misael Moranmoholo *v.* Priscilla Moranmoholo, Central Division, 1950, that "a defendant who has been in default cannot appeal against the merits of a default judgment. His only remedy is to bring himself before the Court by way of application to have the default judgment rescinded. In addition to explaining his absence from Court, he must in his application indicate that he has a good ground of defence to the action . . . But the prime responsibility is for defendant to establish a reasonable explanation of his absence from Court".

The Rules make provision for the rescission of default judgments. That is the procedure which must be followed.

In this respect defendant has appealed against the judgment of the Native Commissioner of the 9th March, 1951, in which an application to rescind and set aside the default judgment entered on 10th February, 1951, was dismissed. Such an appeal is valid. Defendant in an affidavit attached to the application for rescission makes the following statements:—

"That on the 17th of November, 1950, I was represented by Attorney I. Slomowitz of Benoni, who was acting for me in the above matter. On that date plaintiff's attorney addressed a communication to my attorney, which I attach hereto.

During January, 1951, I instructed Attorney Henry Helman of Johannesburg, to take over the matter and to act on my behalf. Attorney Helman requested me to obtain copies of the pleadings and other documents relevant to the action, at the same time informing me that he would make arrangements to attend Court on the 12th of February, 1951, on my behalf, as he intended to leave for a short vacation. Attorney Helman phoned the Clerk of the above Honourable Court in my presence and confirmed to me that the matter was on the roll for the 12th of February, 1951.

I thereafter obtained the relevant docket and file from Attorney Slomowitz and delivered same at the office of Attorney Helman.

During or about January, 1951, I received a summons from this Honourable Court in the matter of James Sibonyone *v.* myself, as will more fully appear from Case No. 5 of 1951. In that action, the claim against me was for an Order interdicting and restraining me from selling, alienating or disposing of the buildings and improvements situate on Stand No. 56, 13th Avenue, Benoni Location, which claim the defendant (James Sibanyone) based upon an agreement which we had entered into during January, 1948, in which on payment of the amount of £5 I agreed that he would have the first right, option and refusal to purchase the said improvements should I at any time contemplate selling same. I had no defence to the said summons and consented to judgment on the return day thereof, namely the 5th of February, 1951. I was unable to consult my attorney about the matter as he was then absent, but as I had no defence I consented to judgment as aforesaid. The said summons purported to have been issued

by Attorney H. M. Basner of Johannesburg, but on the return day thereof Attorney Lewis Baker informed the Court that he was representing the plaintiff and/or Attorney Basner.

Whilst in Court on the 5th of February, 1951, and after judgment had been entered against me on the claim of Sibanyone, Attorney Baker drew the attention of the Court to Case No. 10 of 1949, which was on the Roll for the 12th of February, 1951, as aforesaid, and requested the Court that that matter be heard on Saturday the 10th of February, 1951. I was then requested to attend Court on the 10th of February, 1951, but I informed the Court that I would not be able to do so and that I would attend Court together with my attorney on the 12th of February, 1951. I had no knowledge or notice that the action of Thanjekwayo and myself would be before the Court on the 5th of February, 1951, and had I received any notice to such effect I would have brought the matter to the notice of the attorney whom I had consulted. I also pointed out to the Court that I was not present that day in connection with the claim of Thanjekwayo and that I would not be in a position to proceed with the matter until the 12th of February, when I would be in attendance with my attorney.

On the morning of the 12th of February, 1951, I attended Court and was informed that a default judgment had been granted against me on the 10th of February, 1951, on the above matter.

I aver that the proceedings which took place on the 5th of February, 1951, in the above matter were irregular and I stress that I had employed an attorney as hereinbefore stated. I aver that I was not in wilful default on the 10th of February, 1951, and I was at no time served with a Notice of Reinstatement for that date.

I have a good and bona fide defence to the action in as much as:—

(*a*) I deny that I sold the property and premises to the plaintiff as averred by him in the summons. I admit that there were discussions and negotiations in regard to such a sale, but deny that the sale was concluded.

(*b*) In as much as there is a valid judgment of this Court interdicting me from selling, alienating or transferring the property in question to any persons other than to Sibanyone, the judgment granted on the 10th of February, 1951, is void *aborigine* and is impossible of performance by myself."

Defendant is supported by the affidavit of Henry Helman, another attorney who appears to have been consulted by defendant during January, 1951. Mr. Helman states:—

"That during or about January, 1951, the defendant in the above matter consulted me in regard to the above action. He informed me that the matter was on the roll for trial on the 12th of February, 1951. I telephoned to the Clerk of the above Honourable Court to ascertain for which date the matter was in fact on the roll for trial, and the Clerk of the said Honourable Court confirmed that the hearing was to take place on the 12th of February, 1951. I was due to leave for a vacation and advised the defendant to bring the relevant documents and papers to my office and assured him that I would attend Court on his behalf on the 12th of February, 1951, for the defence of his action.

At 9 a.m. today (the 12th of February, 1951), I telephoned to the Clerk of the Court to asecertain at what time I was required to attend Court for the trial of this action, and was informed by him that a default judgment had been granted against the defendant on the 10th of February, 1951. He thereupon also informed me that the matter had been before

the Court on the 5th of February, 1951. To the best of my knowledge and belief no notice to that effect had previously been conveyed to the defendant or his attorney of record."

Replying affidavits were filed on behalf of plaintiff as follows:—

1. *Lewis Baker,* attorney for plaintiff,

"1. I have read the affidavits of Henry Helman and Nebat Nxumalo.

2. The only attorney whose name appears on the record in this matter was Mr. Attorney Slomowitz who subsequently withdrew from the case. At no time was any communication received by me that Mr. Attorney Helman was appearing.

3. *Ad* paragraph 5 of the affidavit of the said Nxumalo, I wish to state that I was instructed to appear in Case No. 5 of 1951. On my arrival at Court I ascertained the defendant was the same defendant as in Case No. 10 of 1949.

4. *Ad* paragraph 6 of the said affidavit the circumstances detailed in the said affidavit are incorrect. The true facts are as follows:—

'When I ascertained that defendant was the same defendant as in Case No. 10 of 1949, I drew the attention of the Court to Case No. 10 of 1949. I stated that since the parties had agreed, and the Court had already verbally warned defendant not to dispose of the property pending the decision of Case No. 10 of 1949 and since, clearly, Case No. 5 of 1951 showed that defendant was acting contrary to the Court's warning, that the Court should order defendant in terms of its previous instructions to him not to dispose of the said property pending the final outcome of Case No. 10 of 1949.

The said Case No. 10 of 1949 had been set down for hearing for the 12th February. The Court, on perusal of the record advised both defendant and myself that the Native Commissioner would be sitting at the Appeal Court on the 12th and that the matter would have to be remanded. Defendant then stated that he was not prepared for a further remand since he would also be away on the 12th February and thereafter. I then suggested, to meet defendant, that the Court sit on the 10th February.

Defendant was asked whether this date suited him and he agreed that the date was suitable and he would be present in Court. He furthermore stated that he would not bring an attorney since he had no intention of having the services of an attorney in this Court but would use an attorney in the High Court; this despite the fact that the Court advised him to contact an attorney.

Defendant's statement in his affidavit that he stated that he could not appear in Court on the 10th February and that he would attend Court with his attorney on the 12th February, 1951, is without any substance of fact. It is quite true that Case No. 10 of 1949 was not up for hearing on the 5th February and was only brought to the notice of the Court because of Case No. 5 of 1951. On that date application in chambers was made to the Court.'

5. *Ad* paragraph 8, I deny that the proceedings of the 5th February were irregular and stress that the order made followed a prior agreement between the parties and prior verbal order of the Commissioner.

6. I deny that defendant has a good defence to the action.

(*a*) The case has been before the Court since April, 1949, and defendant has had the services of an attorney to defend the matter. Defendant has had every opportunity for leading evidence but since Mr. Attorney Slomowitz withdrew he has adopted an attitude that he would not defend the case in this Court but would take the case on appeal.

(*b*) It is quite clear that the interdict in Case No. 5 of 1951 was not intended to affect the proceedings in Case No. 10 of 1949, and that the purpose of the interdict was to prevent sales subsequent to the alleged sale to Sibanyone."

2. *Ferdinand Paulus van Gass*, the Native Commissioner.

"1. I am Native Commissioner for the District of Benoni.

2. I presided in the case of Solomon Thanjekwayo *v.* N. C. H. Nxumalo concerning the ownership of the buildings on Site No. 56, Benoni Location.

3. Summons in this matter was issued on the 7th February, 1949, and numerous postponements were granted at the request of the parties. On the 11th April, 1950, evidence was led, Mr. Attorney L. Baker appearing for the plaintiff and Mr. Attorney I. Slomowitz for defendant. At the close of plaintiff's evidence and after cross-examination by Mr. Slomowitz the parties advised the Court that it was agreed to argue certain legal issues at that stage. Messrs. Slomowitz and Baker thereupon addressed the Court on the legal issues concerned and the Court gave its ruling on the issue raised on the 26th May, 1950. On the 17th November, 1950, the case was further postponed by consent to the 12th February, 1951. Throughout the proceedings Mr. Lewis Baker represented the plaintiff and Mr. I. Slomowitz the defendant.

4. On the 5th February, 1951, Mr. Baker invited the Court's attention to Case No. 5 of 1951, between J. Sibanyone (plaintiff) and Norbetu Nxumalo (defendant) concerning the same site, viz. Site No. 56, Benoni Location, and applied for an order interdicting and restraining defendant from in any way disposing of the improvements on the said property to James Sibanyone or any other person pending final decision in Case No. 10 of 1949. Nxumalo (defendant in both cases) was in attendance. I advised defendant of the nature of the application and asked him whether he had been in contact with his attorney. Nxumalo replied that he no longer had an attorney in this matter and added that he would employ the services of an attorney when the case was heard in the 'High Court'.

Case No. 5 of 1951 is proof that defendant was prepared to sell the property to Sibonyone and the temporary interdict applied for by Mr. Baker was granted. I then invited the attention of Mr. Baker and defendant to the fact that Case No. 10 of 1949 had been set down for further hearing on the 12th February, 1951, and advised them that I would not be available on that date as I was to serve on the Native Appeal Court in Johannesburg as from that date. Defendant then stated that he would also not be in Court on the 12th February, 1951, because he was going to Zululand.

I then told Mr. Baker and the defendant that in order to meet them I would be prepared to hear the case before the 12th. The case was then postponed by consent to Saturday the 10th February, 1951. Defendant stated that the date was suitable to him and that he would attend.

5. On the 10th February, 1951, Mr. Baker appeared for plaintiff and defendant was in default.

Default judgment was then given.

I say that defendant's statement in paragraph 6 of his affidavit to the effect that—

"I was then requested to attend Court on the 10th of February, 1951, but I informed the Court that I would not be able to do so and that I would attend Court together with my attorney on the 12th February, 1951, is not true. The truth is that the case was postponed to the 10th of February, 1951, with his consent and that he stated in open court that he would attend on that date."

3. *Willem Adriaan Durand.*

"1. I am a Clerk of the Native Commissioner's Court, Benoni.

2. I have read the affidavit of Nxumalo. I note that paragraph 7 says that he attended Court on the 12th February and was told that a default judgment had been granted against him on the 10th February.

No Court was sitting on the 12th February and Nxumalo did not approach me on that particular day."

4. *Solomon Masilo.*

"1. I am an interpreter of the Native Commissioner's Court, Benoni, and interpreted for the Native Commissioner on the 5th May, 1951.

2. I have read the affidavits of Henry Helman and Nebat Nxumalo.

3. On the 5th February, 1951, in Case No. 5 of 1951, defendant and Mr. Attorney Baker appeared before the Native Commissioner. Case No. 10 of 1949 was brought to the Court's attention by Mr. Baker.

Subsequent to an Order being made the Commissioner intimated that he would be in Appeal Court on the 12th February and suggested a remand.

Nxumalo stated that he would be going to Natal on the 12th February and he would not be able to attend on or before such date. Mr. Baker then suggested 10th February, 1951, and Nxumalo agreed that he would be present on that date.

At no time did he inform the Court that he would be unable to be present and that he would attend Court together with his attorney on the 12th February, 1951. It is incorrect that he stated that he would not be in a position to proceed with the matter until the 12th February when he would be in attendance with his attorney. In fact he made it clear that he would only use the services of an attorney in the High Court and not in this Court.

I am advised that he, in fact did attend Court on the 10th February but left before the Court began its sitting.

I did not see him on the 12th February."

Now, on the question of defendant's absence from Court on the 10th February, 1951, there is on the one hand defendant's statement that, while he was in Court on 5th February, 1951, in

connection with Sibanyoni's case, Mr. Baker drew the attention of the Court to the present case which was on the roll for the 12th February and requested that it be heard on Saturday 10th February; that—

> "I was then requested to attend Court on 10th February but I informed the Court that I would not be able to do so and that I would attend Court together with my attorney on the 12th February, 1951. I had no knowledge or notice that the action of Thanjekwayo and myself would be before the Court on 5th February, 1951, and had I received any notice to such effect I would have brought the matter to the notice of my attorney whom I consulted. I also pointed out to the Court that I was not present that day in connection with the claim of Thanjekwayo and that I would not be in a position to proceed with the matter until the 12th February when I would be in attendance with my attorney."

Against this version of events there are the statements of the judicial officer, the Court interpreter and plaintiff's attorney who all allege that the alteration of dates and set down for 10th February, 1951, was due to the Native Commissioner intimating that he would not be available on 12th February. Defendant also stated he would be away in Zululand on 12th February. The Court indicated that it would meet the parties by sitting on Saturday 10th February. Asked whether this date would suit him defendant agreed and said he would be present in Court. He further stated he would not bring an attorney because he had no intention of having the services of an attorney in that Court but would use an attorney in the High Court.

The minutes of proceedings records that on 5th February, 1951, "case postponed by consent to 10th February, 1951". On the 10th February, 1951, defendant was not present in Court and judgment was entered against him by default. The actual grounds of appeal do not refer to defendant's absence from Court. Information on this point must be extracted from the affidavit supporting the application for rescission of the default judgment. Appellant's argument at great length was directed to an attack on the default judgment itself on the grounds that it was bad in law for the reasons given in the latter portion of the notice of appeal, in the main that it was void or patently erroneous. In the case of Izak Thabeni *v.* Daniel Sisilara (Case No. 6 of 1948 of the Central Division) which was a case on all fours with the present case the full Court rejected this line of attack as novel and fallacious. Appellant has assumed a rôle which places him above the Court. It may be perfectly true that in his opinion he belives the judgment to be void or patently erroneous. In this belief he proceeds to require the judicial officer to assume the defensive to justify to him, the appellant, the judgment which was entered. He has not endeavoured to explain his absence from Court but assumes that the judicial officer is the defaulting party. In this respect appellant is placing himself above the law. In our system of law he is required to prove to a Court of higher authority that a judgment is wrong. He cannot assume that a judgment is wrong, because the presumption of law that a judgment of a competent Court is correct excludes every proof to the contrary (Bertram *v.* Wood, 10, S.C., 177). A default judgment is a perfectly valid judgment and as long as it stands of record it cannot be attacked. It can be set aside only by way of rescission. To obtain rescission the defendant must explain and justify his absence from Court. As pointed out above there are two conflicting stories on this matter. The independent Native Commissioner who adjudicated was perfectly entitled to rely on these affidavits without hearing evidence to arrive at a decision. The set down of the case for hearing on 10th February, 1951, with the knowledge and consent of defendant was lawful. Such proceedings to suit the convenience of the Court and the parties take place regularly. Defendant's attitude was quite clear. He was quite indifferent to the proceedings before

the Native Commissioner. He intended to go to the High Court. Nothing could be more deliberate. His absence from Court on the 10th February was clearly wilful and intentional. "If applicant's non-appearance is proved to have been due to 'wilful default' the matter is finished; the Court has no discretion to entertain the application and the judgment becomes final". As was said in Hitchcock *v.* Raaf, 1920, T.P.D., 366 "The person must know that the action is being brought against him that he has no defence or thinks he has no defence and is perfectly willing that judgment shall be given against him." Having failed to disprove his wilful absence from Court, the default judgment against defendant became final. I agree with the facts found proved by the judicial officer dealing with this aspect of the appeal.

In regard to the application for review of the proceedings of the 5th and 10th February, 1951, on the grounds of irregularity, I am unable, in view of the affidavits submitted, to find any irregularity in the proceedings. Above I have stated the facts relating to the proceedings on those two days. Nothing was arranged in the absence of the defendant. The record indicates that he was consulted and agreed to the re-arrangement of the date of continuation of the trial on 10th February, 1951. Whatever may have been the arrangement be made with Mr. Attorney Helman, it must be noted that nowhere on the record does it appear that Mr. Helman was the attorney of record up to the date of entry of the judgment.

In defendant's affidavit in support of the application for review reference is made to proceedings between himself and James Sibanyone based on an alleged agreement of option entered into by them in January, 1948. The action on this matter was instituted on the *15th January,* 1951, and judgment with defendant's consent entered on 5th February, 1951. The action between plaintiff and defendant commenced on 7th February, 1949, and through postponements dragged on for two years. During this time defendant was represented by an attorney. At no time apparently was any reference made to the alleged option granted to Sibonyoni and it was not raised as a defence to plaintiff's summons. If it was material as now suggested by defendant it should have been so pleaded, but in spite thereof defendant proceeded to negotiate the sale of his property to plaintiff. By his conduct therefore he is now estopped from relying on the alleged agreement with Sibonyoni, despite the fact that an interdict has been granted in that connection. The Native Commissioner took the view that he was entitled by defendant's conduct seriously to question his honesty and integrity. I consider that the Native Commissioner was justified in taking that view and also in the view that he would have failed grievously in his duty had he not taken the action which he did. I am also of opinion that Mr. Baker, as an officer of the Court, acted correctly in drawing the attention of the Court to the close connection of the two actions.

An application for review of proceedings on the grounds of gross irregularity is a serious undertaking. Reviews are generally based on imputations of *mala fides* or improper or gross conduct on the part of the judicial officer striking at the administration of justice. The giving of a wrong judgment cannot in itself be an irregularity subject to review.

> "The law", said Lord Bacon, "has so much respect for the certainty of judgments and the credit and authority of judges, that it will not permit any error to be assigned which impeaches them in their trust and office, and in wilful abuse of the same."

Defendant has put himself in difficulty in attempting to dispose of his property to two different persons at the same time and it avails him little to question alleged irregularities in the proceedings. As I have stated I can find no irregularity whatever.

In my opinion the appeal should be dismissed on all grounds with costs.

The members of the Court have taken a different view and their majority judgment will be the judgment of the Court.

For Appellant: Mr. Adv. R. N. Leon, instructed by Mr. L. Baker, P.O. Box 69, Benoni.

For Respondent: Mr. H. Helman of Messrs. Helman & Michel, P.O. Box 3592, Johannesburg.

# PRACTICE AND PROCEDURE: EXCEPTIONS.

CASE No. 14 OF 1951 (ALEXANDRA).

**ENNIE TLOU** *v.* **GERRY LIKWALI.**

JOHANNESBURG: 13th June, 1951. Before H. F. Marsberg, Esq., President, and Messrs. E. V. C. Liefeldt and B. J. D. Liebenberg, Members of the Court (Central Division).

*Practice and procedure—Exception to summons claim for an order of ejectment and damages on the ground of creating a nuisance—Exception taken that summons is vague and embarrassing, that it is bad in law and that it discloses no cause of action, upheld—Native Commissioner's Court procedure does not encourage the taking of tactical or delaying defences—Sec. 26 of Government Notice No. 2253 of 1928—of the essence that real and substantial justice be done—Judgments must be entered on merits of case.*

*Claim:* Order of ejectment and damages from the 1st January, 1951, until date of ejectment calculated at £2. 1s. per month on the grounds that defendant and his family being tenants on plaintiff's premises were creating a nuisance, discord between themselves and between plaintiff and other tenants, in particular that defendant's wife ejected dirty water in front of plaintiff's front door and both defendant and his wife used vulgar and obscene language.

*Plea:* Exception to the summons that it is vague and embarrassing and bad in law and did not disclose a cause of action.

*Judgment:* Summons dismissed with costs on account of being vague and embarrassing.

*Appeal:*

(*a*) That plaintiff's summons does disclose a cause of action.

(*b*) That the alleged shortcomings of the summons could have been met by a request for further particulars.

(*c*) The special plea by defendant is bad in law in that although it alleges that plaintiff's summons does not disclose a cause of action, the particulars of this allegation do not substantiate the said allegation.

(*d*) In that the plaintiff, in terms of the Rents Act had the right to summarily terminate the defendant's tenancy and to claim his ejectment.

*Held:* The Native Commissioner erred in upholding the special plea. The parties should have been afforded an opportunity to place their evidence before the Court in terms of the summons and the plea.

The appeal is allowed with costs, the judgment of the Native Commissioner upholding the special plea is set aside and the case is returned for further attention.

*Authorities:*

(1) Manyane *v.* Dhlamini, 1941, N.A.C. (T. & N.), 110.
(2) Butulezi *v.* Tshabalala, 1942, N.A.C. (T. & N.), 41.
(3) Radebe *v.* Ngidi and Radebe, 1942, N.A.C. (T. & N.), 81.
(4) Elias Mosine *v.* Andy Ndebele, 1943, N.A.C. (T. & N.,) 2.
(5) Section 26 of Government Notice No. 2253 of 1928.

Marsberg (President), delivering judgment of the Court:—

In the Native Commissioner's Court at Alexandra, Johannesburg, plaintiff Ennie Tlou, a Native widow sued defendant Gerry Likwali for an order of ejectment and damages on the grounds that defendant and his family being tenants on plaintiff's premises were creating a nuisance on the property and creating discord between themselves and the plaintiff and between plaintiff and her other tenants in particular, that defendant's wife ejected dirty water in front of plaintiff's front door and both defendant and his wife used vulgar and obscene language and spat at the defendant.

To this claim defendant excepted that the summons was vague and embarrassing and bad in law and did not disclose a cause of action in that:—

(*a*) There is no allegation as to how or on what term or period the defendant's tenancy is terminable.

(*b*) There is no allegation on what date defendant was required to vacate the said premises.

(*c*) No dates or times are given as to when the alleged acts or nuisances were committed by the defendant and the members of his family.

(*d*) There is no specific averment of any alleged acts or nuisances committed by defendant, his wife and his family.

(*e*) There is no allegation on what date the plaintiff cancelled the defendant's tenancy of the said premises.

This exception was argued before the Native Commissioner, was upheld and the summons was dismissed with costs.

The plaintiff has appealed against this decision on the grounds:—

"(*b*) In that plaintiff's summons does disclose a good cause of action.

(*c*) The alleged shortcomings of the plaintiff's summons could have been met by a request for further particulars which request in fact was never made.

(*d*) The special plea by defendant is bad in law in that although it alleges that plaintiff's summons does not disclose a cause of action, the particulars of this allegation do not substantiate the said allegation.

(*e*) In that the plaintiff, in terms of the Rents Act had the right to summarily terminate the defendant's tenancy and to claim his ejectment."

Native Commissioner's Court procedure does not encourage the taking of tactical or delaying defences. Section 26 of Government Notice No. 2253 of 1928 directs that the Court shall call upon the defendant to answer the claim of the plaintiff, whereupon the Court shall proceed with the hearing of the cause summarily and without further pleadings. In other words it is of the essence of Native Court procedure that real and substantial justice shall be done and that judgments must be entered on the merits of the case.

(Manyane *v.* Dhlamini, 1941, N.A.C. (T. & N.), 110.
Butulezi *v.* Tshabalala, 1942, N.A.C. (T. & N.), 41.
Radebe *v.* Ngidi and Radebe, 1942, N.A.C. (T. & N.), 81.
Elias Mosine *v.* Andy Ndebele, 1943, N.A.C. (T. & N.), 2.

To us it is reasonably clear from the particulars of claim on what grounds the plaintiff is proceeding against the defendant. If the defendant required further information he should have

applied for particulars. That is the procedure laid down even in Magistrate's Courts. See Jones and Buckle at page 273. In his reasons for judgment the Native Commissioner has stated that he did not feel inclined to spend much time in unravelling and amending a hopeless summons. The parties could have done this, if necessary. The points raised in the so-called special plea could have been cleared up by further particulars.

We are of opinion that the Native Commissioner erred in upholding the special plea. The parties should have been afforded an opportunity to place their evidence before the Court in terms of the summons and the plea.

The appeal is allowed with costs, the judgment of the Native Commissioner upholding the special plea is set aside and the case is returned for further attention.

For Appellant: Mr. Adv. D. Spitz, instructed by Mr. J. Blieden, P.O. Box 2046, Johannesburg.

For Respondent: Mr. B. A. S. Smits of Messrs. Smits & Smitheman, P.O. Box 7602, Johannesburg.

## DEFAMATION: DAMAGES.

CASE No. 15 OF 1951 (JOHANNESBURG).

**NATHANIEL DHLAMINI** *v.* **P. TSHABALALA.**

JOHANNESBURG: 15th June, 1951. Before H. F. Marsberg, Esq., President, and Messrs. E. V. C. Liefeldt and B. J. D. Liebenberg, Members of the Court (Central Division).

*Defamation—Words used* per se *defamatory—By way of innuendo persons understood that plaintiff was an immoral person—Such accusation requires no argument to substantiate it.*

*Claim:* £100 damages on allegations that defendant wrongfully uttered and published certain defamatory statements in the Zulu language which statements were malicious, slanderous and calculated to injure the plaintiff in his good name, fame, character and reputation.

*Plea:* Denial that statements were published or that they bear the innuendos alleged *alternatively* that the statements were made on a privileged occasion and in exercise of a right and discharge of a duty; *in the further alternative* that the statements were true and that the publication thereof was for the public benefit

*Judgment:* Summons dismissed as showing no cause of action.

*Held:* Words used are *per se* defamatory.

The appeal is allowed with costs, the judgment of the Native Commissioner dismissing the summons is set aside and the case is returned for further attention.

*Authorities:* Nil.

Marsberg (President), delivering judgment of the Court):—

In the Native Commissioner's Court at Johannesburg plaintiff, Nathaniel Dhlamini sued P. Tshabalala for £100 damages for defamation on allegations that on the 22nd May, 1950, and at Johannesburg in the presence of certain persons defendant wrongfully uttered and published certain statements contained in an annexure to the summons in the Zulu language, of and concerning the plaintiff. The allegations made by defendant were malicious, false, slanderous and calculated to injure the plaintiff

in his good name, fame, character and reputation. The annexure referred to purports to be a memorandum of certain proceedings in the Methodist Church of South Africa, Witwatersrand Mission, Albert Street Section. It contains, *inter alia,* the following passage (quoted from a translation obtained and used by the Native Commissioner). (Annexure 1.)

> "I, Isiah Tshabalala, have brought a complaint against Nathaniel Dhlamini, who lives with Lily Mabizela as man and wife, without being legally married. They live in the City of Jabavu at No. 1440, Johannesburg."

To accuse any person with living as man and wife without being legally married is *per se* defamatory. Such an accusation in a civilised community cannot be regarded otherwise and requires no argument to substantiate it. By way of innuendo plaintiff claims that the persons present understood this allegation to mean that the plaintiff is an immoral person. We can safely say that the average person would so interpret such an accusation.

After hearing argument on the pleadings as to whether the summons disclosed a cause of action the Native Commissioner ruled that no cause was disclosed. He dismissed the summons. In his reasons for judgment he confined his attention mainly to this proposition. He states:—

> "The question the Court therefore had to decide was not (1) whether the words complained of were or were not defamatory which is a question of fact but (2) whether the words used were or were not reasonably capable of bearing a defamatory meaning in their primary sense or, taken together with the special circumstances set out in the pleadings, reasonably capable of bearing the meaning assigned to them by the plaintiff in his innuendo which was a question of law and should therefore properly be decided upon exception."

Now, in our view, the words of the accusation which we have quoted are in themselves defamatory and are capable of bearing the meaning assigned to them in the innuendo. We have refrained from expressing an opinion in regard to the remainder of the allegations because the case in one properly for trial. The allegations in the summons and denials in the plea are not proved facts on which the Court could found a judgment but are matters which were submitted for determination after proof in the ordinary manner by way of evidence.

The appeal is allowed with costs, the judgment of the Native Commissioner dismissing the summons is set aside and the case is returned for further attention.

For Appellant: Mr. H. Helman of Messrs. Helman & Michel, P.O. Box 3592, Johannesburg.

For Respondent: A. H. Salovy, P.O. Box 7988, Johannesburg.

## URBAN LOCATIONS: TENANCY: EJECTMENT.

CASE No. 16 OF 1951 (JOHANNESBURG).

**LYDIA SHANDER** *v.* **JACK THELESI.**

JOHANNESBURG: 15th June, 1951. Before H. F. Marsberg, Esq., President, and Messrs. E. V. C. Liefeldt and B. J. D. Liebenberg, Members of the Court (Central Division).

*Claim for order of ejectment and damages—Whether there was any* vinculum juris *between plaintiff and defendant—Plus occupation by third party—Rights of original tenant—Who must take steps for ejectment—Lessor under duty to give lessee* vacua possessio *and* commodus usus*—Lessor is Municipality.*

*Claim:* An order for ejectment from certain rooms situate on Stands Nos. 1179/1306, Pimville Location, Johannesburg, and for payment of damages at 2s. 6d. per day from 1st March, 1949, to date of judgment.

*Plea:* General denial of each and every allegation and specially denies that plaintiff is the owner of the improvements on the said stands and counter-claims:—

(*a*) An order declaring defendant to be the bona fide possessor and owner of all the buildings and erections on the said stands.
(*b*) For payment of the sum of £185.
(*c*) For payment of the sum of £4. 17s. 6d. per month from 1/11/48 to date of judgment.
(*d*) Costs.

*Judgment:*

(*a*) Ejectment of defendant.
(*b*) Damages at the rate of 2s. 6d. per day from 9/10/48 to date of judgment.
(*c*) Costs of suit.

Defendant's counterclaim dismissed with costs.

*Appeal:* The Court erred in its conclusions of law and fact in regard to the issue before it in this matter. The only question argued before the Appeal Court was whether there was any *vinculum juris* between plaintiff and defendant or whether plaintiff had any right to claim and obtain defendant's ejectment from the property.

*Held:* As issues determined in action by Supreme Court plaintiff cannot be given relief.

*Authorities:*

(1) Tshandu *v.* City Council, Johannesburg, 1947 (1), S.A.L.R., 494.
(2) Graham *v.* Ridley, 1931 (T.P.D.), 476.
(3) Willie on Landlord and Tenant, 4th Ed., p. 126.
(4) Alfred Dhlamini *v.* Kortman Kunene, 1938, N.A.C. (N. & T.), 129.
(5) Baum *v.* Rode, 1905, S.C., 66.
(6) Nicolas *v.* Wigglesmith, 1937, N.P.D., 376 and 380.
(7) Aaron Mtjoli *v.* Lena Siyingo, 1945, N.A.C. (N. & T.), 88.

Marsberg (President), delivering judgment of the Court:—

In the Native Commissioners Court of Johannesburg plaintiff, Jack Thelesi, sued defendant, Lydia Shander, for an order for her ejectment and of all persons claiming through her from certain rooms situate on Stands Nos. 1179/1306, Pimville Location, Johannesburg, and for payment of damages at 2s. 6d. per day from 1st March, 1949, to date of judgment. Judgment was given in plaintiff's favour as prayed.

It will be as well to give a short history of the case. Defendant, Lydie Tshandu, is the divorced wife of one Bethuel Tshandu. Plaintiff, Jack Thelesi, purchased the stand rights from Bethuel Tshandu. The position between the three parties is incorporated in the facts found to be proved by the Native Commissioner to wit:—

1. The marriage in community of property of Bethuel Tshandu and Lydia Tshandu was dissolved by the Native Divorce Court, Natal and Transvaal Provinces, on the 14th June, 1939.

2. Lydia Tshandu was granted a final decree of divorce against Bethuel Tshandu with forfeiture of the benefits of their marriage.

3. Bethuel Tshandu acquired the lease of Stands Nos. 1179/1306, Pimville Location, from the City Council of Johannesburg in 1925, and the site permit of those stands was registered in his name.

4. At the time of the dissolution of the marriage of Bethuel Tshandu and Lydia Tshandu, an old cottage only stood on the Stand No. 1306. There were no erections on the Stand No. 1179.

5. The defendant, Lydia Tshandu, had three rooms built on the Stand No. 1179 after the dissolution of her marriage with Bethuel Tshandu.

6. On the 7th February, 1942, the City Council of Johannesburg caused the lease of the Stands Nos. 1179/1306, Pimville Location, to be transferred into the name of the defendant.

7. On the 21st October, 1946, as a result of the Supreme Court's Judgment, Witwatersrand Local Division, in the case of Tshandu *v.* City Council, Johannesburg, S.A.L.R., 1947 (1), p. 494, the City Council was legally compelled to retransfer the site permit of Stands Nos. 1179/1306 into the name of Bethuel Tshandu, and cancel the site permit of those stands which the defendant was then holding. Those acts were duly carried out.

8. In 1948, Bethuel Tshandu sold all buildings and erections on the said stands to the plaintiff, and requested the City Council to have the site permit of the stands transferred into the name of the plaintiff.

9. On the 9th October, 1948, the City Council, through the Superintendent, Pimville Location, gave registered transfer of the lease of the Stands Nos. 1179/1306 to the plaintiff, and Bethuel Tshandu renounced all his rights and interest in the said stands to and in favour of the said plaintiff, Exhibit "A".

The only question argued before us on appeal was whether there was any *vinculum juris* between plaintiff and defendant or whether plaintiff had any right to claim and obtain defendant's ejectment from the property. Mr. Rein for appellant (defendant), argued that plaintiff's rights were rights *in personam,* that he had not received delivery of the property under lease from the Municipality of Johannesburg and could therefore exercise no rights *in rem.* It is common cause that the Municipality is the owner of the stands in question, standing therefore in the position of landlord and that the occupiers are lessees with personal rights of tenants. It is clear, too, that although the Municipality, through the Location Superintendent registered plaintiff, Thelesi, as the site permit holder of the stands, the landlord did not put plaintiff in occupation of the premises nor give him *vacua possessio.* There was no delivery of the property as the term is understood.

The conclusion of a contract of letting and hiring imposes the following duty on the landlord:—

> To deliver to the tenant the use and occupation of the property let.

The *actio conducti* is the action available to the tenant in claiming from the landlord the use and occupation of the property let. The action is brought by the tenant and lies against the landlord. The duty of the landlord to deliver the use and occupation of the property to the tenant consists primarily in transferring to the tenant the *detentio* or physical control of the property let; he must give the tenant not only *vacua possessio* but also the *commodus usus* of the property let. Admittedly in the case before us the landlord has not carried out his obligations. It has been said that "delivery in one or other form is absolutely essential if the ownership in a thing is to be passed from seller

to buyer. The fact that a contract of sale has been concluded and the price paid by the purchaser gives him nothing but a personal right against the seller to compel delivery".

Mr. Rein has argued that the only party who can cause defendant's ejectment is the Municipality or the landlord. There appears to be substance in that contention. Not only does the law appear to point that way but the matter has been determined by the judgment of the Supreme Court in the case of Bethuel Tshandu *v.* City Council of Johannesburg, 1947 (1), S.A.L. Reports, wherein an identical state of affairs pertained as between Tshandu and his ex-wife, the present defendant. In that case it was held—

(*a*) that as the respondent (the City Council was the owner of the location, the ownership of all buildings therein vested in it;

(*b*) that the holder of a permit was in the position of a lessee;

(*c*) that a lessor was under a duty to give his lessee *vacua possessio* and *commodus usus*;

(*d*) that by merely issuing a site permit, the Council had not given the lessee *vacua possessio* and it was bound to take steps to eject the occupier.

Now, the position of present plaintiff, Jack Thelesi, is no better than that of Bethuel Tshandu. Obviously, by his purchase of Tshandu's rights, plaintiff obtained nothing more than Tshandu was entitled to. He stands of the same footing as Tshandu stood in his litigation with his ex-wife (defendant) and the City Council. Tshandu's rights were the personal right of action (*actio conducti*) against the Council to compel delivery. Tshandu had no rights *in rem*. Nor is plaintiff Jack Thelisi in any better position.

The Native Commissioner has taken the line that "the plaintiff after having obtained transfer of the site permit into his name was entitled to enforce his legal rights as the lease-holder of these stands against the defendant who was occupying three rooms on the stands unlawfully as against him". Unfortunately we have been unable to find any legal authority to support this view. In face of the direct judgment of the Supreme Court on the identical issues we are unable to take the matter any further. The mere issue of the site permit in plaintiff's favour did not constitute delivery of the property, without which he could exercise no rights *in rem*.

Though this is an action between Native and Native reference to the Municipality of Johannesburg has been inevitable in view of the litigation closely related to this case in which it was involved.

We have not dealt with the other issues involved in the case before the Native Commissioner, particularly that raised in the counterclaim. If plaintiff fails in his claim for ejectment the other contingent questions fall away.

As the rights of the parties appear to have been defined by the judgment of the Supreme Court the remedy as claimed by plaintiff in this case cannot be supported.

The appeal is allowed with costs and the judgment of the Native Commissioner is altered to read:—

"For defendant with costs".

For Appellant: Mr. Adv. S. G. Rein, instructed by Messrs. Smits & Smitheman, P.O. Box 7602, Johannesburg.

For Respondent: M. J. Rosen of Harry Solomon, Esq., Dunvegan Chambers, Joubert Street, Johannesburg.

# ADULTERY: DAMAGES: ALLEGATION OF CUSTOMARY UNION.

CASE No. 17 OF 1951 (JOHANNESBURG).

**REUBEN MBEJE *v.* LAWRENCE MOLOI.**

JOHANNESBURG: 20th June, 1951. Before H. F. Marsberg, Esq., President, and Messrs. E. V. C. Liefeldt and J. W. van der Watt, Members of the Court (Central Division).

*Claim for damages for adultery with wife by alleged customary union—Customary union disputed—Not proved*—Quantum *of evidence required to establish* prima facie *case in regard to alleged marriage.*

*Claim:* £15 damages for adultery with plaintiff's customary wife with costs.

*Plea:* Denial of adultery and alleges that plaintiff was not married to the said woman.

*Judgment:* Absolution from the instance with costs.

*Appeal:*

(*a*) That the judgment is against the evidence and the weight of evidence.

(*b*) That the judgment is bad in law by reason of the fact that the evidence adduced on behalf of plaintiff established a *prima facie* case.

*Held:* In the circumstances of the case plaintiff had not established a *prima facie* case. His evidence is unreliable.

*Authorities:*

Siyangapi *v.* Mbandweni, 1942, N.A.C. (C. & O.), 113.
Mapiliba *v.* Mkohliwe, 1944, N.A.C. (C. & O.), 101.

Marsberg (President), delivering judgment of the Court:—

In the Native Commissioner's Court at Johannesburg plaintiff, Reuben Mbeje, sued defendant, Lawrence Moloi, for £15 damages for adultery with plaintiff's wife, Dolly Mbeje, to whom he claimed to be married according to Native Custom. Defendant in his plea denied that plaintiff is the husband of Dolly and said that plaintiff was never or at any time married to Dolly according to Native Custom or any other manner whatsoever. On this issue plaintiff only gave evidence and at the end thereof defendant applied for absolution which was granted.

Plaintiff has appealed against this judgment on the grounds—

(*a*) that it is against the evidence and the weight of evidence;

(*b*) that it is bad in law by reason of the fact that the evidence adduced on behalf of plaintiff established a *prima facie* case.

The Native Commissioner has relied on the case of Siyangapi *v.* Mbandweni [1942, N.A.C. (C. & O.), 113], wherein it was laid down that "where a customary union is denied in the plea it is incumbent upon the plaintiff to prove it conclusively and not be content to rely on his own statement and that of the women who usually know nothing about the details of lobola payments. It is essential that he should be corroborated by the lobola-holder or other members of his own or his wife's people".

Plaintiff's evidence in relation to his marriage is as follows: "I am married by Native Custom to Dolly Mbeje. I paid £10 lobola to James Nohayi for Dolly. As far as I know James is father of Dolly. Solomon Tayi was my "Nozakuzaku" as also

one Nlaba who is deceased. I was present when they paid money to James at No. 47, Roodepoort West Location. Dolly was then handed over to me. I think this was in 1947. James did not kill anything. They lent Dolly to me to nurse my mother. I then took her home and killed a goat as my mother was ill. I was invoking the spirits of my forefathers to come and cure my mother. The money was paid in 1947 but Dolly was handed over to me in 1946. I abducted her in 1946 and her parents came and looked for her and found her with me. It was then agreed that full lobola should be £35 and 7 head of cattle . . . I then paid £10 towards lobola." (He goes on to say he contributed £48 towards the building of Dolly's parent's house.) "As I paid towards building of house it was to be taken as lobola. We lived together as man and wife up to 27th July, 1950, when I found my wife in the house of defendant . . . I paid the £10 in 1948 but cannot remember the month. (Exhibit A gives the date 2nd May, 1948.) When I abducted Dolly I had intercourse with her. She was then about 20 years old and she had a child before that . . . I deny that I paid the £10 as seduction".

The Native Commissioner has regarded the plaintiff's evidence as contradictory and unsatisfactory. He has drawn attention to the fact that no material witnesses were called to prove the marriage. To establish a Native customary union three essentials must be proved, viz.:—

(1) Agreement between the groups as to lobola.

(2) Consent of the contracting parties.

(3) Handing over of the bride.

On the question of handing over plaintiff claims that Dolly was handed over in 1946. He admits he abducted her then and had intercourse. *Prima facie* he would have been liable to seduction damages. The first payment of £10 was made on 2nd May, 1948, if Exhibit A is to be accepted at its face value. It is signed by S. K. Mboreng who is apparently not Dolly's father and purports to acknowledge receipt of two cattle as lobola for the daughter of Esther and James Nohai. Further, plaintiff states that they lent Dolly to him to nurse his mother. For these two years there is no clear proof of a formal handing over. Normally where there has been abduction and seduction, and in this case it must be noted that the abduction was followed up, the number of cattle paid must exceed the customary fine for seduction to indicate that dowry arrangements have been concluded. The payment of only two head of cattle is not indicative of lobola or dowry. We cannot ascertain from plaintiff's evidence that there were any specific negotiations in regard to lobola nor at what stage there was a handing over of the bride. Plaintiff claims that he and Dolly lived together as man and wife up to 27th July, 1950. That statement cannot be correct as far as the period 1946 to 2nd May, 1948, is concerned. They may have cohabited but not as husband and wife. She appears to have left him in July, 1950, to live with defendant.

On this evidence and on the authority of Siyangapi's case the Native Commissioner was fully justified in granting absolution from the instance at the close of plaintiff's case.

There appears, however, to be a later conflicting decision in the case of Mapiliba *v.* Mkohliwe (1944, N.A.C., C. & O., 101), wherein the Court said: "At the close of plaintiff's case the defendant's attorney asked for an absolution judgment, apparently on the submission that there was no marriage since a full Basuto bohali had admittedly not passed. Moreover, it was submitted that the *quantum* of proof, being that of the 'husband' and 'wife' was inadequate. Both contentions are wrong . . . Proof of the payment of lobola can come from the husband or any other witness, even the wife, and a defendant cannot discredit that evidence by mere silence. It stands until rebutted . . . There is a *prima facie* case to meet".

Assuming that this statement as to the *quantum* of evidence is correct we must consider whether plaintiff had established a *prima facie* case in regard to his alleged marriage. The Native Commissioner has referred to the case of Gascoyne *v.* Paul and Hunter, 1917, T.P.D., 170. Therein we find this statement of the law:—

> "At the close of the case for plaintiff the question which arises for consideration of the Court is: Is there evidence upon which a reasonable man *might* find for plaintiff? And if the defendant does not call any evidence but closes his case immediately the question for the Court would then be: Is such evidence upon which the Court *ought* to give judgment in favour of plaintiff?"

That is the test of what may be a *prima facie* case. In the case before us was there evidence on which the Native Commissioner *might* find for plaintiff? The Native Commissioner has found plaintiff's evidence to be contradictory and unsatisfactory. There is much to be said for his conclusion. £10 paid after abduction and seduction is more consistent with a payment of damages. Payment of money for building purposes is not consistent with a payment of lobola. That in itself is not Native Custom and would require special proof. The circumstances surrounding the relationship of plaintiff and Dolly are not indicative of a customary union. Although therefore plaintiff's evidence was the only evidence on the question, his statement contained so many inherent improbabilities and contradictions that we are of opinion the Native Commissioner was justified in hesitating to find that he might find in favour of plaintiff. We cannot say he erred in entering a judgment of absolution from the instance.

The appeal is dismissed with costs.

For Appellant: Mr. H. Helman of Messrs. Helman & Michel, P.O. Box 3592, Johannesburg.

For Respondent: Mr. I. L. Meskin, 37 Coronation Buildings, 23 Simmonds Street, Johannesburg.

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# SEDUCTION AND PREGNANCY.

CASE No. 18 OF 1951 (TAUNGS).

**ALIHILE GEORGE MANCHWE *v.* ANGELINA OLIPHANT.**

KIMBERLEY: 29th June, 1951. Before H. F. Marsberg, Esq., President, and Messrs. K. J. Mummbrauer and H. N. Doran, Members of the Court (Central Division):—

*Appeal from Chief's Court—Damages for seduction—Where defendant denies the intercourse, his oath is to be preferred to the woman's unless there is evidence* aliunde *to corroborate her—Onus very heavily on a plaintiff—Evidence must be corroborated, truthful and reliable—Delay in reporting a pregnancy may be fatal.*

*Claim in Chief's Court:* Six head of cattle as damages against defendant for seduction and pregnancy of plaintiff's daughter.

*Plea:* Denial of intercourse.

*Judgment:* For plaintiff for six head of cattle.

*Judgment of Native Commissioner:* Chief's judgment confirmed.

*Appeal:*

(1) That there was not sufficient coroboration as required by law of the evidence of plaintiff's daughter.
(2) That the judgment was against the evidence and weight of evidence.

*Held:* Onus on plaintiff not discharged and the judgment of the Native Commissioner and Chief is altered to read: "Absolution from the instance with costs."

*Authorities:*

(1) Elda Makulo *v.* Johannes Fibla (1936, N.A.C., C. & O.), 1.
(2) Mginseni Mbala *v.* S. Zulu and another, N.A.C. (N.E. Div.), Vol. 1, Part IV, p. 86.
(3) Nolte *v.* Rowe, 1926, T.P.D., 615.
(4) Poggenpoel *v.* Morris, 1938, C.P.D., 90.
(5) Van der Merwe *v.* Nel, 1929, T.P.D., 551, distinguished Poggenpoel and Morris, 1938, C.P.D., 90.
(6) Dawson *v.* McKenzie, 1908, S.C., 648, p. 649.
(7) Kleinwort *v.* Kleinwort, 1927, A.D., 323.
(8) Van Druten *v.* Burger, 1925, 9, W.L.D., 43, Whitfield, p. 442.
(9) Williams *v.* Young, 1910, 20, C.T.R., 970.
(10) Nathan *v.* Torts, p. 189.
(11) Wickman *v.* Simon, No., 1938, A.D., 447.

Marsberg (President), delivering judgment of the Court:—

This is an appeal against the decision of the Native Commissioner of Taungs confirming a judgment of Chief Thampana R. Mankuroane, Paramount Chief of the Bathlaping by which plaintiffs, Angelina Oliphant and John Oliphant, were awarded six head of cattle as damages against defendant, Olihile George Mancwe, for the latter's seduction and pregnancy of Angelina Oliphant. The case before the Native Commissioner was an appeal against the Chief's judgment. After hearing evidence in the prescribed manner the Native Commissioner confirmed the Chief's judgment.

Defendant has now appealed to us on the following grounds:—

(*a*) That there was insufficient corroboration as required by law of the evidence of Angelina.
(*b*) That the judgment is against the weight of evidence.

In the case of Elda Makuto *v.* Johannes Fibla (1936, N.A.C., C. & O., 14) the Appeal Court made the following remarks:—

"Her evidence that she has been seduced is afforded the strongest corroboration by the birth of a child to her of which she has sworn that defendant is the father. If no evidence is brought to rebut this then there is sufficient evidence on which a reasonable man might give judgment for plaintiff.

The rule of law is that in paternity cases, where defendant denies the intercourse, his oath is to be preferred to the woman's unless there is evidence *aliunde* to corroborate her."

There must be evidence from the women's oath to persuade the trial Court that her statement can be accepted as truthful. In view of the preference given to a defendant where there is merely oath against oath, the onus lies very heavily on a plaintiff to establish her claim. Not only must her evidence be corroborated but it is essential that her evidence should be truthful and reliable.

It is of great importance therefore in the case before us to ascertain whether Angelina was a reliable and truthful witness because her claim is based in the main on her word alone. The only corroboration of her story is that defendant was in the vicinity of her home on Christmas Day, 1949. There is no corroboration of the alleged acts of intercourse. She alone states that she and defendant had intercourse twice behind her house within a period of a little over 10 minutes in the evening. Defendant denies such intercourse. Plaintiff did not at any time

volunteer any information in regard to her pregnancy but some months after conception admitted it when her parents questioned her. It has been mentioned in several cases of the Native Appeal Courts that delay in reporting a pregnancy can in some instances be fatal to a plaintiff's claim for damages, but in any event undue delay in reporting must naturally detract from the value of her evidence in regard to the seduction. Again, Angelina has on her own evidence admitted the practice of a wilful act of deception in connection with the writing of an examination. She confesses that she procured another person to write her examination for her. In this she stamps herself as a person capable of and guilty of dishonesty. When, therefore, the question must be asked whether she is a trustworthy person whose bare word should be accepted a Court would hesitate to believe her. As we have pointed out the only direct evidence in regard to the acts of intercourse rests on plaintiff's word alone. Defendant's counsel has pointed out contradictions and discrepancies in the case for plaintiff, all of which do tend to weaken her case. In the main, however, we feel that plaintiff herself is an untrustworthy person, not above acts of deception for her own benefit, and it would be unsafe to believe her bare word as to the cause of her pregnancy. Defendant has been attacked on the ground that he attempted to prove an alibi which he failed to establish. It was urged that his failure in this respect should be held as corroboration for plaintiff's story. There would be substance in that argument were plaintiff herself reliable, but she cannot expect to cure serious doubt as to her own credibility by imperfections in defendant's story. The onus resting on her requires to be discharged before she can succeed. This case rests entirely on questions of fact and the sufficiency of evidence. Except for the fact that defendant was proved to be present at the place in question there are no surrounding suspicious circumstances from which it can be inferred that he was in a position to have had intercourse with plaintiff. In our view the Native Commissioner should have entertained a doubt in regard to the truthfulness of plaintiff's statement. Loath as we are to interfere with a Native Commissioner's findings on fact this is a case where we must intervene.

The appeal is allowed with costs and the judgment of the Native Commissioner and the Chief is altered to read:—

"Absolution from the instance with costs".

For Appellant: Mr. C. G. Sassin, P.O. 443, Kimberley.

For Respondent: Mr. J. Pickup of Messrs. Louw & Pickup, P.O. Box 123, Vryburg.

## LOBOLA: CLAIM FOR RETURN.

CASE No. 19 OF 1951 (LINDLAY).

**BOOI N'THEBE *v.* JONKMAN M'TEUNG.**

KROONSTAD: 20th August. 1951. Before H. F. Marsberg, Esq., President, and Messrs. I. P. O'Driscoll and D. J. van N. Groenewald, Members of the Court (Central Division).

*Refund of lobola in contemplation of customary union—If father or woman prevents union taking place, payer of dowry entitled to reclaim thereof—Pregnancy by another man entitles prospective husband ta repudiate negotiations—Credibility of witnesses—Counterclaim not substantiated—Common Law and Native Law dismissed.*

*Claim:* £56 and one horse valued £5 being return of lobola paid in contemplation of a Native customary union in consequence of daughter's default by becoming pregnant by another man.

*Plea:* Defendant admits having received £56 and one horse as part payment of lobola and tendered delivery of daughter on payment of four head of cattle being balance of lobola due.

*Counterclaim:* Six head of cattle or their value £30 damages on allegation that plaintiff rendered daughter pregnant.

*Judgment: On claim:* For plaintiff as prayed with costs.

*On counterclaim:* Absolution from the instance with costs.

*Appeal:*

(*a*) On fact.
(*b*) Law.
(*c*) That the judgment is against the evidence and weight of evidence.

*Held:* That the Native Commissioner has correctly determined the issues in this case.

The appeal is dismissed with costs.

*Authorities:*

Rex *v.* Dhlumayo, 1948, (1), S.A.L.R.

Marsberg (President), delivering judgment of the Court:—

In the Native Commissioner's Court at Lindley, Orange Free State, plaintiff Jonkman M'teung sued defendant Booi N'thebe for payment of £56 and one horse valued £5, being return of lobola paid by plaintiff in contemplation of a Native customary union with defendant's daughter, Emily, in consequence of Emily's default by becoming pregnant by another man before the union took place.

Defendant admitted receiving the £56 and one horse as part payment of lobola and tendered delivery of Emily on payment by plaintiff of four head of cattle, being the balance of lobola due. Defendant also counterclaimed for payment of six head of cattle or their value £30 as damages on allegation that plaintiff was the cause of Emily's pregnancy.

On plaintiff's claim the Native Commissioner gave judgment in his favour as prayed and absolution from the instance with costs on the counterclaim.

Defendant has appealed against the whole judgment on the following grounds:—

1. That the Native Commissioner erred in his finding that defendant ever agreed and undertook to refund that part of the lobola paid to him.
2. That the Native Commissioner erred in his finding that defendant (plaintiff in reconvention) failed to prove that plaintiff (defendant in reconvention) seduced the former's daughter, Emily, and was the father of her child.
3. That the Native Commissioner erred in his finding that the contents of Exhibit A is that which is given by the translation thereof, and further that the whole of the said contents had been written by the witness Daniel.
4. That the Native Commissioner erred in applying common law principles in this suit and should have granted defendant's application for absolution at the close of plaintiff's case on ground that plaintiff had not paid the lobola in full and could not sue for repayment of part lobola paid without alternatively suing for the delivery of his wife as contended for by defendant.
5. That the judgment is against the evidence and weight of evidence.

From the evidence it is quite clear that a customary union between plaintiff and Emily did not take place because the woman was not handed over to the plaintiff. The lobola was duly paid in 1947. That is acknowledged by defendant. Defendant's attitude was that he was waiting for payment of the full lobola before he would hand over his daughter. In evidence he says:—

"Hy kan nie meid kry nie as die vier beeste nie betaal word nie."

Defendant was therefore holding the lobola paid merely in contemplation of the union taking place. He did not become the owner thereof. In Native Law if the father or the woman prevents the union taking place through the fault of either the payer of the dowry is entitled to reclaim return thereof. If the woman is rendered pregnant by another man that is default on her part and her prospective husband is entitled to repudiate the negotiations. Admittedly Emily gave birth to a child. The Native Commissioner has not been able to find that plaintiff was the father of the child. Plaintiff was therefore entitled to return of the lobola as claimed by him.

The Native Commissioner need not have relied on the Common Law to support his judgment. Arising out of Emily's pregnancy a meeting of the parties and their relations was held on 3rd October, 1950, before the birth of the child. A document (Exhibit A) was drawn up on Defendant's dictation and signed by him in which he agreed to refund to plaintiff on the 6th October, 1950, the lobola paid by him. In ground 3 of the notice of appeal defendant has attacked the Native Commissioner for relying on the translation given by the Court Interpreter. This point does not appear to have been taken during the trial. The record bears a note by the Native Commissioner. Mr. Hattingh (defendant's attorney) agrees to a translation of letter being made by official interpreter). The interpreter was cross-examined by Mr. Hattingh when he handed in the translation by way of evidence. We do not follow the force of this ground of appeal. The translation fairly reflects the purport of Exhibit A.

This document is, however, important in testing the credibility of the evidence of defendant and his witnesses. It is quite clear that it has embarrassed them. They endeavour to say that it does not contain what they said it should contain. In fact what the dictator, Booi Nthebo, says should be in it is not there at all. Yet it is the document he signed and he must be bound by it. In that respect it casts a doubt on the story told by the witnesses wherein they claim that plaintiff was the cause of the pregnancy. On the 3rd October, 1950, at the meeting defendant must have been satisfied that plaintiff was not the father of the child, otherwise he would hardly have agreed to refund the lobola. The whole basis of the counterclaim rests on the pregnancy having been caused during a visit of one night in February, 1950, when plaintiff is alleged to have visited at Emily's parents' place. Plaintiff and Emily had not seen one another before that occasion. Emily says she slept with plaintiff that night. Plaintiff says he slept with her brothers. Plaintiff and his witnesses say that he produced a special pass to show that his visit had been two months earlier. The girl had said the pregnancy was six months old and the pass showed that plaintiff had been there eight months before. After this it was alleged that defendant was satisfied that plaintiff had not seduced Emily and Exhibit A was then drawn up.

The Native Commissioner has found that the counterclaim for damages for seduction and pregnancy has not been substantiated. The appeal against his finding rest on questions of fact. On the evidence before him we cannot say that he could not reasonably have arrived at his decision. He has given good reasons for the view he took. An appellant must satisfy us that

the Native Commissioner was manifestly wrong. In our opinion he has failed to do so. (Rex *v.* Dhlumayo, 1948, II, S.A. Law Reports.) The difference between the contents of Exhibit A and the later statements made by defendant and his witnesses must reflect on their credibility.

In regard to the fourth ground of appeal the Native Commissioner need not have invoked the Common Law to support his judgment. Under Native Law his judgment would equally be correct. As there was no customary union between the parties and as Emily was not plaintiff's wife plaintiff could not sue for her return. Even if full lobola had not been paid no legal impediment exists to an action for refund of the part which has been paid.

We are satisfied that the Native Commissioner has correctly determined the issues in this case.

The appeal is dismissed with costs.

For Appellant: Mr. J. N. Dreyer instructed by Mr. W. Israel, P.O. Box 255, Bethlehem.

For Respondent: Adv. H. F. de Wet, instructed by M. J. Vermeulen, P.O. Box 7, Lindley.

# POSTPONEMENTS.

CASE No. 20 OF 1951 (GERMISTON).

**THOMAS MTIMKULU *v.* RICHARD DHLAMINI.**

JOHANNESBURG: 25th October, 1951. Before H. W. Warner, Esq., Actg. President, Messrs. H. G. F. Towne and J. C. Venter, Members of the Court (Central Division).

*Application for postponements—general rule—desirability of bringing cases to finality as expeditiously as possible—discretion of the Court—plaintiff has other means of redress if injustice is suffered by the refusal to grant postponement—Native Commissioner's Court Rules does not provide for dismissal of summons—"Summons dismissed" however, tantamount to absolution from the instance.*

*Claim:* £25 damages for wrongful arrest and costs.

*Plea:* Admits arrest but denies that it was wrongful.

*Judgment:* Summons dismissed with costs.

*Appeal:*

(1) The Native Commissioner erred in not granting plaintiff a postponement to enable him to bring further evidence.
(2) The Native Commissioner erred in not granting leave to plaintiff to procure the services of another attorney when his original attorney withdrew.

*Held:* It was within the discretion of the Native Commissioner to grant a postponement and the Court is not prepared to say that in refusing the two applications he did not exercise his discretion judicially (merits of the case not considered). The appeal is dismissed with costs.

*Authorities:*

(1) Molopi *v.* Ntuli, 1937, N.A.C. (T. & N.) 137.
(2) Section *fifteen* of Act No. 38 of 1927.
(3) Ndudane *v.* Maqwoti, 1937, N.A.C. (C. & O.) 280.

Warner (Acting President), delivering the judgment of the Court:—

Plaintiff sued defendant in the Court of the Native Commissioner, Boksburg, for £25 as damages for wrongful arrest. Summons was issued on the 5th April, 1950, and contained an allegation that the act complained of took place on the 3rd August, 1949.

In his plea, defendant admitted the arrest but denied that it was wrongful.

The case was postponed on three occasions before being heard on the 11th April, 1951. On this date, plaintiff and his wife gave evidence and then plaintiff's attorney applied for a postponement on the ground that according to the evidence there were two more witnesses for plaintiff and the latter stated that these witnesses had arranged to be present and therefore had not been subpoenaed and their employers had apparently not released them for the purpose of attending Court. Mr. Baker, plaintiff's attorney, asked for a postponement to enable him to subpoena the two witnesses.

Defendant's attorney opposed the application for a postponement and it was refused.

Mr. Baker then withdrew from the case.

Plaintiff then asked for a postponement to enable him to engage another attorney but this application was also refused.

After hearing evidence for defendant the Native Commissioner gave the following judgment:—

"Summons dismissed with costs of suit".

Plaintiff has appealed against this judgment on the following grounds:—

1. That the Native Commissioner erred in not granting plaintiff a postponement to enable him to bring forward further evidence.

2. That the Native Commissioner erred in not granting leave to plaintiff to procure the services of another attorney when his original attorney withdrew.

If plaintiff's witnesses had not attended Court, his proper course was to apply for a postponement, if he wished to do so, when the case was called. No explanation has been furnished as to why he did not adopt this course.

It was stated in the case of Molopi *v.* Ntuli 1937, N.A.C. (T. & N.), 137, that the rule with regard to postponements is that neither party can insist on a postponement if thereby public interest is detrimentally affected. If the roll be congested or the Court is not otherwise able to hear a case on a date convenient to the parties, they cannot compel the Court to grant a postponement. If the convenience of the Court be not affected, then the next consideration is the possibility of prejudice to respondent who must indicate the nature thereof. If the difficulty cannot be overcome by an adjustment of costs, the case must proceed. It rests with the plaintiff as *dominus litis* to withdraw his action at this stage and to bring it on afresh if he so desires.

In the present case, there is a possibility that defendant would have been prejudiced by the granting of the application for postponement because, not only was this the fourth occasion on which the case had been set down for hearing, but plaintiff's case had been partly heard when the application was made.

The Native Appeal Court has on several occasions drawn attention to the desirability of bringing cases between Native litigants to finality as expeditiously as possible.

In regard to the second ground of appeal, it is not understood on what ground Mr. Baker withdrew from the case. As was pointed out in Molopi's case, it is stated in Van Zyl's Judicial Practice, Vol. 1, page 33, 4th edition, *inter alia,* that an attorney "must, when once he has undertaken the client's case, not abandon it without good and lawful reasons or excuses (what these are must depend upon the circumstances of each case, e.g. sickness, absence from the country, mutual enmity, and gross misleading statements made by the client)". We consider that Mr. Baker was not justified in abandoning his client's case merely because his application for postponement had been refused. As has been pointed out by Counsel for respondent, if it is held that the Native Commissioner should have granted the application by plaintiff for a postponement in order to enable him to engage the services of another attorney, it would mean that in every case where an application for a postponement has been refused, the attorney can withdraw from the case and leave his client to apply for a postponement on the ground that he wishes to secure the services of an attorney. In this case it is noted that Mr. Baker withdrew from the case but afterwards noted the appeal.

It was within the discretion of the Native Commissioner to grant a postponement and we are not prepared to say that, in refusing the two applications, he did not exercise his discretion judicially.

As a final Court of Appeal, this Court must in the spirit of section *fifteen* of Act No. 38 of 1927, guard against barring its doors on technical grounds to any litigant who has suffered an injustice which he cannot redress in any other way and which in the opinion of the Court he has not acquiesced in or condoned. If plaintiff has suffered an injustice, however, by the refusal to grant his application for a postponement, he has other means of redress because he can bring a fresh action. The judgment given was "summons dismissed". Rule 28 of the Rules of Courts of Native Commissioners does not provide for such a judgment but it was held in the case of Ndudane *v.* Maqwati, 1937, N.A.C. (C. & O.), 200, that a judgment dismissing a summons with costs was tantamount to absolution from the instance and there is nothing to prevent the plaintiff from instituting a fresh action if he desires to do so.

As there is no appeal against the merits of the case, it is unnecessary for this Court to consider them.

The appeal is dismissed with costs.

For Appellant: Mr. Adv. Leon, R.N., instructed by Mr. Lewis Baker, P.O. Box 69, Benoni.

For Respondent: Mr. Adv. Kotze, G.P.C., instructed by Messrs. Malherbe, Rigg and Ranwell, P.O. Box 186, Boksburg.

# CHIEF'S COURT—CIVIL JURISDICTON.

CASE NO. 21 OF 1951 (ZEERUST).

## MOKGWETSI MEREOTLE and ANOTHER *v.* BENJAMIN TSELE and ANOTHER.

JOHANNESBURG, 26th October, 1951. Before H. W. Warner, Esq., Actg. President, Messrs. H. G. F .Towne, J. C. Venter, Members of the Court (Central Division).

*Case concerning estate heard by Chief of Baharotsi tribe, Linokana, Zeerust—Section* twelve *of Act No.* 38 *of* 1927*—Interpretation of section* twenty-three (4) *of the Act—Judgment of Chief is valid—plea of* res judicata *upheld and Native Commissioner's judgment altered—Chief's judgment can be upset only by an appeal and not by fresh action in Native Commissioner's Court.*

*Claim:* 10 oxen, 12 cows, 3 calves, 1 wagon, 1 plough and 1 set yokes or their value, £272, declaration of rights regarding certain land, alternative relief and costs of suit.

*Plea: Res judicata.*

*Judgment:* On claim for land, summons dismissed.

For plaintiff for 25 head of estate cattle or their value £205, 1 wagon or its value £20, 1 plough or its value £6 and 1 set of yokes or its value £4 with costs.

*Appeal:*

(1) That the Assistant Native Commissioner erred in finding that the Native Chief had no jurisdiction and that the latter's judgment was only interlocutory and not final and that the Native Chief could not ajudicate upon the matter.
(2) That the Assistant Native Commissioner erred in accepting the appointment of Benjamin Tsele as administrator of the estate of the late Dikole.
(3) That the assistant Native Commissioner erred in holding that the parties and cause of action were not the same.
(4) That the Assistant Native Commissioner erred in dismissing the plea of "*res judicata*".
(5) That the Assistant Native Commissioner erred in finding that Motseotsile was not lawfully adopted by the late Dikole Tsele.
(6) That the judgment is bad in law.

*Held:* The appeal is allowed with costs and the judgment of the Native Commissioner is altered to read:—

"Plea of *res judicata* upheld and claim dismissed with costs."

*Authorities:*

(1) Section *twelve* of the Native Administration Act, No. 38 of 1927.
(2) Moshesh *versus* Moshesh, 1936, N.A.C. (C. & O.), 69.
(3) Dhlamini *versus* Dhlamini, 1938, N.A.C. (T. & N.), 241.
(4) Dickinson, N.O., *versus* Mokalini, 1938, N.A.C. (T. & N.), 255.

(5) Dhlamini *versus* Dhlamini, 1939, N.A.C. (T. & N.), 95.

Warner, Acting President (delivering the judgment of the Court:—

Plaintiffs sued Defendants in the Court of the Native Commissioner, Zeerust, for certain property or its value £272, declaration of rights regarding certain land, alternative relief, and costs of suit. They furnished the following particulars of claim:—

(1) That all the parties hereto are natives.

(2) That a document showing the family trees of Pudule Tsele after his marriages by native law and custom to his senior wife, Boetelo, and his junior wife Madikola is attached hereto. This document should be referred to as reference to it will simplify the issue in this matter; this is marked Annexure A.

(3) That a document showing that the 1st Plaintiff, Benjamin Tsele, was appointed to represent the estate of the late Dikole Tsele by the Native Commissioner, Zeerust, Marico District, on the 13th September, 1950, is attached hereto; this is marked Annexure B.

(4) That Dikole Tsele married a daughter of 1st Defendant, Mokgwetsi Meregotlhe, and that he died about 10 years ago and was childless; that Abea died about a year ago and was also childless.

(5) That after the death of Abea there remained in the estate of the late Dikole Tsele, the following movable property which should now revert back to the heir of Pudule Tsele by his senior wife, Boetelo, and that that heir is Garogwe Tsele, the 2nd Plaintiff, as this property came from Pudule Tsele to Dikole Tsele through Pudule Tsele's Junior wife, Madikola, in the first place.

This property consists of:—

| | |
|---|---|
| 10 oxen at £10 each ... ... ... ... ... ... | £100 |
| 12 cows at £8 each ... ... ... ... ... ... | 96 |
| 3 calves at £5 each ... ... ... ... ... ... | 15 |
| 1 waggon at £50 ... ... ... ... ... ... ... | 50 |
| 1 plough at £5 ... ... ... ... ... ... ... | 5 |
| 1 set yokes at £6 ... ... ... ... ... ... ... | 6 |
| TOTAL ... ... ... ... | £272 |

(6) That there is also a large field or lands in the vicinity of Benjamin Tsele's house which was included in the estate of the late Dikole Tsele.

(7) That it is the contention of the Plaintiffs that all the property mentioned in paragraphs (5) and (6) above should revert back and vest in the heir to Pudule Tsele by his senior wife, Boetelo, and that this heir is Garogwe Tsele, the 2nd Plaintiff.

(8) That the 1st Defendant, Mokgwetsi Meregotlhe, after the death of Abea, his daughter, handed all the property mentioned in paragraphs (5) and (6) above, over to Matiako Molebatsi who is married to Abea's younger sister; that there is issue of this marriage between Matiako Molebatsi, 2nd Defendant and Abea's younger sister, namely Maserawa, and that is a male youth, Rantokolo, and that it is the intention of the Defendants to hold the property mentioned in trust for Rantokolo.

(9) That the procedure mentioned in paragraph 8 hereof is contrary to all native law and custom and that the property mentioned in paragraphs 5 and 6 hereof should revert and vest as described in paragraph 7 hereof as being in accordance with native law and custom.

(10) That after proper and legal demands, the Defendants refuse to give up to the Plaintiffs the property mentioned in paragraphs 5 and 6 hereof.

ANNEXURE A.

Family Tree of Pudule Tsele (now deceased):—

| | |
|---|---|
| Married senior wife Boetelo, now deceased, by native law and custom. | Later married junior wife, Madikola, now deceased, by native law and custom. |
| Son, Modisadife (deceased), who married M'Masadi (still alive) by native law and custom. | Son, Dikole (deceased), who married Abea, daughter of Mogwetsi, by native law and custom, also deceased. |
| Son, Garogwe, now 14 years of age. | No offspring.<br>Matiako Molebatsi married Masarawa, younger sister of Abea. Offspring: Rantokolo. |

In their plea, defendants pleaded *res judicata*. They also furnished the following alternative plea:—

(*a*) That the lawful heir and successor to the estate of the late Dikole Tsele is Motseotsile Molebatsi who was lawfully adopted by the said late Dikole Tsele and his wife Abea according to Native Law and Custom.

(*b*) That ever since his babyhood the said Motseotsile Molebatsi resided with and grew up as the son of the said Dikole Tsole and his wife Abea.

(*c*) The said adopted son has always been considered as the lawful heir and successor to Dikole Tsele and his wife and that he was formally adopted according to Native Law and Custom and the adoption was confirmed by the Chief openly to the knowledge of the tribe.

After hearing evidence, the Native Commissioner gave the following judgment:—

On claim for land, summons dismissed and further for plaintiffs for 25 head of estate cattle or their value £205, 1 wagon or its value £20, 1 plough or its value £6 and 1 set of yokes or its value £4, with costs.

Defendants have appealed against this judgment on the following grounds:—

1. That the Assistant Native Commissioner erred in finding that the Native Chief had no jurisdiction and that the latter's judgment was only interlocutory and not final and that the Native Chief could not adjudicate upon the matter.

   (*a*) According to section *twelve* of the Native Administration Act (No. 38 of 1927), a Native Headman has jurisdiction in any civil dispute between Native and Native in his tribe, except for any question of nullity, divorce, separation arising out of any marriage.

   (*b*) All the parties are Natives and within the jurisdiction of the Bahurutsi (Bechuana) tribe under Chief Abram Moiloa, witness No. 1.

   (*c*) All witnesses, including respondents' witnesses admit that the Chief duly awarded the whole estate to Motseotsile alias Rantokolo.

2. That the Assistant Native Commissioner erred in accepting the appointment of Benjamin Tsele as Administrator of the estate of the late Dikole, and Abea Tsele, where such enquiry was only held and appointment was only made approximately six months after the Native Chief duly awarded the whole estate to Motseotsile, and furthermore where the first respondent knew that he had to note an appeal against the Chief's judgment.

That the enquiry and appointment of first respondent as administrator was out of time as an appeal should have been noted against the Native Chief's judgment.

That the appellants were prejudiced in their defence as a result of the respondent's default in noting an appeal to the Native Commissioner's Court against the Chief's judgment.

3. That the Assistant Native Commissioner erred in holding that the parties and cause of action were not the same. Attention is especially drawn to both respondents' evidence.
4. That the Assistant Native Commissioner erred in dismissing the plea of *res judicata.*
5. That the Assistant Native Commissioner erred in finding that the boy Motseotsile was not lawfully adopted and was only taken for herding purposes temporarily.
   (*a*) According to all witnesses Motseotsile was taken by the late Dikole Tsele and the late Abea Tsele while still a very small child.
   (*b*) Attention is drawn to the so-called Will of the late Abea Tsele where she specifically mentions "The child born by my sister for me" and to Motseotsile's evidence where he states that he only after the death of Abea Tsele came to know that Matiako was his real father.
   (*c*) That Motseotsile as adopted son of the late Dikole Tsele and the late Abea Tsele, who had no children of their own, is entitled to the whole estate. See I. Schapera, Handbook on Tswana Law and Custom—page 174.
   (*d*) See the evidence of Petty Chief Makukanyane Phule as to the adoption of Motseotsile by the late Dikole and Abea Tsele.
6. That the judgment is bad in law.

It is common cause that a case concerning this estate was tried by Abram Moiloa, Chief of the Baharotsi tribe of the Moiloa Reserve at Linokana in the District of Marico who has been authorised to hear and determine civil claims in terms of sub-section (1) of section *twelve* of Act No. 38 of 1927.

The Native Commissioner held that the Native Chief had no jurisdiction to adjudicate upon the matter and his judgment was therefore not a valid one and could not form the basis of a plea of *res judicata.* He based his reasoning on the wording of sub-section (4) of section *twenty-three* of Act No. 38 of 1927 which provides that any dispute or question which may arise out of the administration or distribution of any estate in accordance with Native Law shall be determined by the Native Commissioner or where there is no Native Commissioner by the Magistrate. He interpreted this sub-section as meaning that the jurisdiction to determine disputes or questions which may arise out of the administration or distribution of an estate in accordance with Native Law is vested exclusively in the Native Commissioner or Magistrate, as the case may be.

This was the view expressed in the case of Mohulatsi *v.* Mohulatsi, 1932, N.A.C. (T. & N.), 56, which held that neither a Chief's Court nor a Native Commissioner's Court has jurisdiction to determine a matter which falls within the purview of sub-section (4) of section *twenty-three* of the Native Administration Act. This decision was, however, over-ruled in the following cases: Moshesh *v.* Moshesh, 1936, N.A.C. (C. & O.), 69; Dhlamini *v.* Dhlamini, 1938, N.A.C. (T. & N), 241; Dickinson, N.O., *v.* Makatini, 1938, N.A.C. (T. & N.) 255 and Dhlamini *v.* Dhlamini, 1939, N.A.C. (T. & N.), 95.

The position must now be accepted that, while it was the intention of the Legislature to secure the expeditious and efficient administration and distribution of the property in a Native estate

by as simple and inexpensive a procedure as possible, it was not the intention of that body by making regulations in that respect to close the doors of the Courts of Native Chiefs or Native Commissioners to any Native litigant save only in those matters excepted by sections *ten* and *twelve* of Act No. 38 of 1927.

Having decided that the Chief's judgment was valid, we must now consider whether the action in which judgment has been given was between the same parties or their privies, concerning the same subject matter and founded upon the same cause of complaint as the action in which the defence was raised.

The Native Commissioner states that the parties to the present case are not the same as the parties to the case in the Chief's Court because Plaintiff No. 2 and Defendant No. 1 were not parties in the Chief's Court. According to the summons, Plaintiff No. 2 is a male youth, 14 years old, and Plaintiff No. 1 is his legal guardian. In his evidence, the Chief stated that Plaintiff No. 1 claimed the estate property but said that he was claiming it for the minor Plaintiff No. 2. If, in the Native Commissioner's Court, Plaintiff No. 2 sued, duly assisted by his guardian, Plaintiff No. 1, whereas, in the Chief's Court, Plaintiff No. 1 sued on behalf of Plaintiff No. 2, as guardian of the latter, we consider that the plaintiff must be regarded as being the same in both cases.

It has also been argued that Plaintiff No. 1 is not suing in the Native Commissioner's Court in the same capacity as that in which he sued in the Chief's Court as he has, since the hearing of that case, been appointed by the Native Commissioner to represent the estate of the late Dikole Tsele. It is correct that Plaintiff No. 1 is described as representing the Estate of the late Dikole Tsele and that paragraph 3 of the summons mentions his appointment as such but the summons does not contain a claim that the property in the estate should be handed to Plaintiff No. 1 for distribution by him, according to law, in his capacity as representative of the estate. On the contrary, paragraph 7 of the particulars of claim, contains the statement that the property in the estate should vest in Plaintiff No. 2. In the Chief's Court, Plaintiff No. 1 claimed the property on behalf of Plaintiff No. 2 and he makes the same claim in the Native Commissioner's Court.

In the Chief's Court, Defendant No. 2 claimed the property in the estate on behalf of his son Motsoetsile who is alleged to have been adopted by the late Dikole Tsele and to be his heir. According to paragraph 8 of the particulars of claim, Defendant No. 1 is being sued because, after the death of Dikole's widow, he handed the estate property to Defendant No. 2 and this paragraph contains the statement: "It is the intention of the defendants to hold the property mentioned in trust for Rantokolo". It appears that Rantokolo is the same person as Motsoetsile.

We consider, therefore, that the defendants in the Native Commissioner's Court must be regarded as the same defendants in the Chief's Court, claiming in the same capacity on behalf of the minor Motsoetsile.

The Chief gave judgment in respect of the property in the estate of the late Dikole Tsele and this is also the subject matter of the present case. The Native Commissioner states that the Chief emphatically denies having dealt with the matter as an estate but this is not borne out by the evidence of the Chief. In his evidence-in-chief, he gives a list of the lands and properties in the estate and states: "The judgment in the case was that the arable land was awarded to Defendant No. 2 as also all the other properties enumerated above". Under cross-examination he states: "I did not deal with the matter as an estate. I dealt with the matter as follows: 'It was proved the arable land belonged to Matiako which I awarded to him. All the other things which cropped up during the procedure I awarded to him, because they were already in his possession. I awarded it to him for the minor'". In answer to the Court, he states: "Matiako

Molebatsi came to me and instituted action for an arable land against Benjamin Tsele (1st plaintiff). Benjamin during the course of the proceedings said that the other things mentioned were also his property. I enquired whether there were any other things which Matiako has got which he was given. I enquired about the whole. The judgment was: (*a*) For the arable land to Abea's son, Motsoetsile; (*b*) that all the property Benjamin is claiming belongs to Motsoetsile". We consider that these statements can mean only that the matter was not commenced as an estate enquiry but that Defendant No. 2 brought action against Plaintiff No. 1 in respect of an arable land and that the latter counter-claimed in respect of other property in the estate and this then formed the subject matter of the action. It is clear from the Chief's evidence that he gave judgment in respect of all the property in the estate.

Attempts were made to show that the Chief gave judgemnt in respect of the arable land only but the chief is the person authorised in terms of sub-section (1) of section *twelve* of Act No. 38 of 1927 to hear and determine civil claims and we consider that his statement as to what judgment he gave should be accepted.

In the Chief's Court, the cause of action was the heirship of the late Dikole Tsele and this is also the cause of action in the present case. The Chief held that Motsoetsile, as the adopted son of the late Dikole Tsele was the latter's heir and that Defendant No. 2, as guardian of Motsoetsile, is entitled to the property in the estate, while the Native Commissioner held that Motsoetsile is not the heir but that Plaintiff No. 2 is the heir to late Dikole Tsele.

Instead of taking steps to have the Chief's judgment set aside by appealing against it, Plaintiffs have brought a fresh action in the Native Commissioner's Court. Provision is made in Government Notice No. 2255 of 1928 for the execution of Chief's judgments and an anomalous position would obtain if the present judgment were allowed to stand because Plaintiffs might seek to enforce the judgment in the Native Commissioner's Court while Defendants might seek to enforce the judgment in the Chief's Court.

The appeal is allowed with costs and the judgment of the Native Commissioner is altered to read:—

"Plea of *res judicata* upheld and claim dismissed with costs."

For Appellant: Mr. Adv. Kuiper, H.C., instructed by Messrs. van Gorkom and Noonan, P.O. Box 636, Johannesburg.

For Respondent: Mr. A. G. Barlow, Attorney, Zeerust.